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## The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice

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# THE PASSIVE VIRTUES AND THE WORLD COURT: PRO-DIALOGIC ABSTENTION BY THE INTERNATIONAL COURT OF JUSTICE

Antonio F. Perez\*

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## INTRODUCTION: AMERICAN CONSTITUTIONAL LAW AS AN ANALOGY TO THE JURISPRUDENCE OF THE ICJ

Some thirty-five years ago, Alexander Bickel recognized that the United States Supreme Court in exercising its power to review the constitutionality of acts of Congress could do not two, but three, things.

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Not only could the Court validate or invalidate statutes; it could also definitively refuse to do either.<sup>1</sup> In Bickel's view, the reasons the Court might fail to discharge its constitutionally prescribed duty to exercise jurisdiction in "all" cases and controversies "within its competence"<sup>2</sup> reflected the inevitable tension between law and politics. A decision by a court to legitimize or delegitimize a decision by a political organ must be based on principle. By contrast, politics necessarily involves prudential judgments.<sup>3</sup> In making such judgments, the Court might legitimately consider its own institutional self-preservation, and if necessary to maintain its credibility as a non-political institution, make pragmatic judgments regarding the best means for implementing constitutional principles. Yet, many found this version of the Bickelian insight deeply

1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69 (1962).

2. U.S. CONST. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.* Justice Marshall's formulation in *Cohens v. Virginia* is canonical:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.

*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

3. See BICKEL, *supra* note 1, at 70. Bickel's distinction is not, however, like Ronald Dworkin's later distinction between deontological and teleological modes of reasoning. Dworkin distinguishes between "principles," as standards of judgment derived from morality that are independent of the particular social outcome advanced, and "policies," as standards of judgment that further some particular good. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1978); cf. *INTERNATIONAL LAW ANTHOLOGY* 381–88 (Anthony D'Amato ed., 1994) (distinguishing positivism and natural law). Although even Dworkin concedes that the two concepts can be collapsed in a range of cases, Bickel's "prudential" exercise of judgment to advance "principles" treats the "principles" to be advanced as though they were, in Dworkin's usage, mere "policies." See DWORKIN, *supra*, at 23. This reading of Bickel's conception of "principle" is consistent with Bickel's fundamentally positivist concern, expressed in his exegesis of the "counter-majoritarian difficulty," with the need for consent. See generally BICKEL, *supra* note 1, at 16–28 (discussing the role of "principle" in judicial review). Thus, to the extent Bickel argues for pragmatism in the service of principle, he should not be misunderstood to advance, like Dworkin, an argument for "principle" based on non-positivist jurisprudential premises.

problematic, for it suggested a kind of Platonic Guardianship<sup>4</sup> that might entail the convenient, yet corrupting, lie that the Court is above politics—much like the so-called “noble lie” Plato’s Guardians would tell the *hoi polloi* of the Guardian’s superiority.<sup>5</sup> Thus corrupted, the Court would be free to impose its own view of the Constitution over an equally, if not more, plausible interpretation of a coordinate branch.

Nonetheless, argued Bickel, the U.S. Supreme Court could, and should, refrain from exercising its jurisdiction by using “an almost inexhaustible arsenal of techniques and devices,” including far more than the political question doctrine. Bickel asserted the legitimacy of declining jurisdiction because these methods are “quite properly called techniques for eliciting answers, since so often they engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise.”<sup>6</sup> In so doing, the Supreme Court need not abandon the project of principled government;<sup>7</sup> rather, Bickel’s hope was to preserve the Court to perform its “grand function” of making possible “principled government.”<sup>8</sup> More important, by abstaining, the Court might spur the political branches to make prudential judgments that better accord with the principles articulated by the Court as it deferred adjudicating the merits of disputes.<sup>9</sup> In short, although others have dismissed Bickel’s methods as an unprincipled surrender to expediency,<sup>10</sup> he may plausibly

4. See LEARNED HAND, *THE BILL OF RIGHTS* (1958), discussed in BICKEL, *supra* note 1, at 46–49.

5. See PLATO’S REPUBLIC, Bk. III (I.A. Richards ed. and trans., 1966); see also I.F. STONE, *THE TRIAL OF SOCRATES* 166–68 (1989) (describing the “noble lie” as the “dark side of Plato’s utopia”).

6. BICKEL, *supra* note 1, at 70–71.

7. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), discussed in BICKEL, *supra* note 1, at 49–51.

8. BICKEL, *supra* note 1, at 71.

9. In articulating this central rationale for abstention, Bickel recalled Thayer’s rule of clear mistake in constitutional adjudication, which Thayer defended in part on the ground that deference to the legislature would encourage correction through the political process, thereby promoting public participation in that process. See *id.* at 21–22 (quoting from J.B. Thayer’s biography of John Marshall). This representation reinforcing rationale for abstention from judicial review has also been employed to justify judicial review itself in cases where structural or other defects preclude effective functioning of the political process. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–88 (1980) (explaining the jurisprudence of the *Carolene Products* footnote, and modern equal protection law in terms of the permanent inability of “insular minorities” to achieve membership in governing coalitions, *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

10. See, e.g., Leslie Pickering Francis, *Law and Philosophy: From Skepticism to Value Theory*, 27 LOY. L.A. L. REV. 65, 76 (1993) (stating that Bickel’s “passive virtues” allowed the Court to withhold “ultimate constitutional judgment” from “cases that it was not institutionally suited to decide, even when a principled rationale was available for the decision”);

be read to argue that abstention should be employed to catalyze a reasoned dialogue among the people, the original sources of constitutional value, and the people's agents, the political branches of government. Furthermore, this dialogue would further the application of constitutional principles to concrete cases and, in so doing, clarify and progressively develop constitutional values.<sup>11</sup> Thus, Bickel's Court was not packed with Socratic philosophers who loved constitutional principles for their abstract quality. Rather, the Bickelian judge saw principles in light of the "historically conditioned complexities of actual institutions."<sup>12</sup> And, in

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Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) (arguing that "Bickel's 'virtues' are 'passive' in name and appearance only" and that "a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint"); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 623 (1976) (reasoning that, in the context of the political question doctrine, if the court had to reach the merits of the question presented to it, it would at least be required "to consider . . . an allegation that the political branches have acted unconstitutionally"); Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 614 (1987) (The political question doctrine is "more easily demonstrated to be nonexistent than any other nonjusticiability doctrine."); Martin H. Redish, *Judicial Review and the "Political Question Doctrine"*, 79 NW. U. L. REV. 1031, 1033, 1043-55 (1985) (critiquing Bickel's reasons for the passive virtue embodied in the political question doctrine and concluding that those reasons are flawed because "its moral, social, and political costs outweigh its speculative benefits"); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 720 (1993) (reviewing H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991)) (summarizing Bickel's "passive virtues" as an endorsement of the "Court's exercise of self-conscious political judgment in dodging certain issues when [the Court] perceived that the political costs of a visible decision might be too high"); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 9 n.8 (1996) (distinguishing himself from Bickel on the basis that he considers the legislature, not the Court, "the central deliberative institution," while Bickel, who "fear[ed] . . . political backlash," considered the Court "the basic repository of principle in American government").

11. See, e.g., Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 201-02 (1969) (stating that Bickel's "passive virtues" are "maxims of political jurisprudence" defining the "terms of the 'colloquy' between the Court and the other agencies of government"); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1586-87 (1985) (explaining that this "conversation . . . regarding matters of principle . . . may help the Court itself to a better understanding of the issues involved and a better resolution of them"); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 652, 655 (1989) (reading Bickel to hold that "delay and avoidance were not technical devices at the margin of the judicial function" but were rather "methods by which the error of abstraction could be prevented"; that judges who are forced "to listen when the timing or issue was wrong would only lead to unfortunate decisions on the merits"; and that it was better to avoid deciding on the merits rather than "to stunt political discourse"); Kenneth Ward, *Alexander Bickel's Theory of Judicial Review Reconsidered*, 28 ARIZ. ST. L.J. 893, 908 (1996) (arguing that Bickel's "passive virtues" allow the Court to "contribute to citizens' political education by engaging in a colloquy with elected institutions and the public").

12. Kronman, *supra* note 11, at 1590. Kronman notes that "[b]y offering a partial or reversible solution to a constitutional problem, a solution that bespeaks its own uncertainty regarding the principle or principles involved, the Court invites the other branches of government, and the public, to rise to a consideration of principle and address the problem in the

shedding light on this melange of principle and practice, the Supreme Court would play the part of dialogic ringmaster.

What has this to do with the International Court of Justice (ICJ)? The World Court's jurisdiction over "cases" extends only to "all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."<sup>13</sup> Thus, the ICJ's jurisdiction is much more limited than the U.S. Supreme Court's.<sup>14</sup> Nonetheless, it is increasingly plausible to treat the U.N. Charter as a constitution for an emerging constitutional community in which the Secretary-General, Security Council, and General Assembly represent states, peoples, and sub- or trans-national interests.<sup>15</sup> Bickelian questions now seem ripe for analysis in the jurisprudence of the World Court. It is worth asking, in those cases where the ICJ does have juris-

same spirit." *Id.* at 1587, n.84 (citing Professor Burt's "dialogic conception" of the Supreme Court's role. Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 *YALE L.J.* 455 (1984)).

13. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 1. In addition, States that are parties to the Statute may:

at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

*Id.* at art. 36, para. 2.

14. This is not to ignore the theoretical power, under Article III of the U.S. Constitution, of the Congress to regulate the appellate jurisdiction of the Supreme Court by "exceptions and regulations." See PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS SYSTEM* 362-68, 377-82, 384-87 (1988) (discussing the limits to the "exceptions and regulations" clause). It is simply that this power exists more in theory than in fact; thus, it is an insufficient basis to collapse the difference between the general jurisdiction of the Supreme Court and the more limited jurisdiction of the ICJ.

15. See generally Antonio F. Perez, *On the Way to the Forum: The Reconstruction Of Article 2(7) and Rise Of Federalism Under the United Nations Charter*, 31 *TEX. INT'L L.J.* 353, 355-57, 384-98 (1996) (proposing that the decline of the non-intervention principle in international law suggests the emergence of a supranational constitution supporting the interests of the supranational community); but see Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 *INT'L & COMP. L.Q.* 55, 58 (1994) (arguing that enforcement action by the Council is merely "one form of countermeasures undertaken on the basis of a collective and institutionalised decision of an international organisation, in the defence of fundamental community interests, as distinct from those 'horizontal' reactions taken by an injured State or States within a bilateral context"); Matthias J. Herdegen, *The "Constitutionalization" of the UN Security System*, 27 *VAND. J. TRANSNAT'L L.* 135 (1994) (questioning the utility of the constitutional model for assessing the scope of the ICJ's power to review the decisions of the Security Council).

diction, does the ICJ have a "duty to decide," and if so, should it ever be able to avoid that duty, or at least delay its performance.

On one hand, scholars who have been called "legalists" argue that the ICJ, despite its "duty to decide," has failed, thus far, to check adequately the Security Council's exercise of its power under the U.N. Charter. On the other, scholars who have been called "realists" maintain that the ICJ has, if anything, transgressed its legitimate domain by suggesting that it does have the power to review the decisions of the political organs of the United Nations.<sup>16</sup> In a sense, the World Court legalists are the heirs of Herbert Wechsler's insistence on neutral principles of judicial review, while World Court realists share Learned Hand's fear of rule by an unaccountable judiciary<sup>17</sup> even if, unlike their Supreme Court brethren, the judges of the ICJ are untenured and, thus, politically accountable.<sup>18</sup>

Given the recent outpouring of law-making activity by the Security Council, yet a third, neo-Bickelian view has emerged, arguing that the ICJ will not be able to avoid passing on the legality of Security Council action and that the only question is how the ICJ will exercise its power of review.<sup>19</sup> This third view suggests that the ICJ should act in an "expressive" mode, drawing from American constitutional law scholarship observing that the U.S. Supreme Court articulates its ideal vision of the U.S. Constitution as an aspirational document.<sup>20</sup> The ICJ would then not only "cue" a coordinate body such as the Security Council as to

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16. See Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 2, n.5 (1996). Alvarez describes a debate whose leading advocates are, on one side, legalist Thomas Franck and, on the other side, realist Michael Reisman. Compare Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992), with W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993). According to Alvarez, these scholars have engaged in a misplaced debate, since assessing the Court's exercise of its review function requires first identifying an appropriate theory of governance that will be implemented by the ICJ's intervention in law-making through judicial review. See Alvarez, *supra*, at 18.

17. Cf. *supra* note 16. An additional point as suggested to me by Michael Reisman is that, even if the Supreme Court's understanding of the domestic political process might on occasion justify its performance of a law-prescribing function, it is doubtful that ICJ judges could claim sufficient knowledge of the international political process to do so.

18. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 13, para. 1 ("The members of the Court shall be elected [by the Security Council and General Assembly] for nine years and may be re-elected . . ."). For some, this might make the judges of the ICJ problematic for the counter-Bickelian reason that, because they are subject to political pressure, the justice they dispense is instinctually unprincipled. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (discussing the problems associated with an elected judiciary).

19. See Alvarez, *supra* note 16, at 20-24.

20. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 219 (1982) (discussing the expressive function of the Supreme Court).

limits it should internalize in the exercise of its powers but also “‘shape [the] people’s vision of their Constitution and of themselves.’”<sup>21</sup>

The expressive mode of review by the ICJ seems to track partially the Bickelian insight that policymaking by courts seems most legitimate when it conforms to principle and furthers the project of principled government. What it fails to account for, however, is the need to balance the ICJ’s “grand” responsibility with the accommodation of prudential judgments made by the U.N.’s political organs in response to the needs of the moment. Only an “arsenal of techniques and devices” for abstention will allow the ICJ to perform its expressive function in a way that allows it to refrain from interventions that tend to undercut transnational political processes. Thus, in discharging its “duty to decide” contentious cases and in rendering advisory opinions prematurely or immodestly,<sup>22</sup> the ICJ may well end constitutional dialogues even before they have commenced, condemning itself to irrelevancy and thus making its voice merely “sound and fury / [s]ignifying nothing.”<sup>23</sup> Or it might well succeed in its goals of principled government, but only through elite consensus in its Platonic Guardianship, and perhaps through a coalition with one of the coordinate political organs.<sup>24</sup> In short, transnational democracy requires a machinery for abstention to facilitate an exercise of the expressive mode of review that fulfills not only the ICJ’s “grand” function of furthering principled government but also principled government’s alloyed promise to respect only the values “constitutionalized” through the transnational political process.

Some commentators, however, have not found machinery for abstention in the ICJ Statute’s text or negotiating history,<sup>25</sup> much as Justice

21. Alvarez, *supra* note 16, at 30–31 (quoting BOBBITT, *supra* note 20, at 193).

22. As Learned Hand suggested in a different context, “[t]he spirit of liberty is the spirit which is not too sure that it is right.” LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES* 190 (3d ed. 1960).

23. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5, lines 27–28 (Nicholas Brooke ed., Clarendon Press 1990) (1606).

24. The Court is not unaware of the role it can play in legitimizing action by the Security Council. Its former President, Mohammed Bedjaoui, has noted that the Court can “assure ‘the peoples’ [of the world] when it is sought to mobilize them through world opinion, that there is nothing pernicious about the action contemplated by the Security Council.” Mohammed Bedjaoui, *Introduction: On the Efficacy of International Organizations: Some Variations on an Inexhaustible Theme*, in *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS* 7, 26 (Niels Blokker & Sam Muller eds., 1994). This power may well be abused by the ICJ when, as some have argued, the ICJ acts in an unprincipled way to further the purposes of the political organs of the U.N., such as by giving effect to U.N. resolutions adopted pursuant to Chapter VII of the U.N. Charter, whose purpose was to interfere with ongoing litigation before the Court. *See, e.g.*, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, 1992 I.C.J. 3, 50–71 (Apr. 14) (dissenting opinion of Judge Weeramantry).

25. *See* Edward Gordon, *Legal Disputes Under Article 36(2) of the Statute*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 183 (Lori F. Damrosch ed., 1987)



Marshall failed initially to find discretion in the U.S. Supreme Court's exercise of its powers of review.<sup>26</sup> This article argues that the ICJ's jurisprudence includes a settled subsequent practice<sup>27</sup> of prudential abstention that, with the increase in legislative activity by the political organs of the U.N., will become more important to the Court's exercise of its functions. This is particularly so because of the increase in the probability of conflicts between the U.N. and individual States, generating issues that might be described under the broad label of international federalism,<sup>28</sup> as well as increasing conflicts between the two preeminently

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[hereinafter *Legal Disputes*]; Edward Gordon, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 129 (1987) (arguing that use of the term "legal dispute" in Article 36(2) provides no basis for limiting the jurisdiction of the Court in contentious cases in terms of either whether a "dispute" exists or whether, if there is a dispute, it is a "legal" dispute). *But see* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 292, n.1 (2d rev. ed. 1985).

26. *See* BICKEL, *supra* note 1, at 69.

27. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention's norms are reflected also in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543, which would set forth the applicable treaty interpretation rules governing an issue involving a multilateral treaty such as the ICJ Statute. These rules of treaty interpretation are also widely regarded as binding customary international law. *See* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970). However, it might seem more fruitful to ground an interpretation of the Statute of the ICJ, as an instrument central to the operation of the Charter, in the quasi-constitutional mode of analysis that seems more appropriate for Charter analysis. *See* LOUIS B. SOHN, *RIGHTS IN CONFLICT: THE UNITED NATIONS & SOUTH AFRICA* (1994); *see also* Perez, *supra* note 15, at 373-96 (arguing that constitutional, rather than treaty interpretation, should account for stability and change in the United Nations Charter). But whatever model is employed, the practice of the ICJ is sufficient to outweigh the relative paucity of evidence derived from its text and negotiating history.

28. Drawing on the experience of the U.S. Supreme Court, commentators have recognized the ICJ case law's potential role in "forging and maintaining an effective federal system." Richard Bilder, *International Dispute Settlement and the Role of International Adjudication*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra* note 25, at 155, 158, n.13 (reporting suggestion of Professor Thomas Franck). Similarly, in constructing federalism-based doctrines of international judicial restraint, one might well draw on *Younger v. Harris*, 401 U.S. 37, 46 (1971), in which the U.S. Supreme Court refused to adjudicate, citing "the fundamental policy against federal interference in state criminal prosecutions." Justice Black argued that "Our Federalism" represents:

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious through it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

*Id.* at 44. *See generally* CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* §§ 52, 52A (5th ed. 1994) (discussing *Younger v. Harris*, as well as other doctrines founded on federalism and related concerns under which federal courts abstain).

political organs of the U.N., the Security Council and General Assembly, raising what might be called separation of powers issues.<sup>29</sup>

Does this mean that there is an international "political question doctrine," under which the ICJ decides not to exercise jurisdiction because of separation of powers considerations? Admittedly, the World Court explicitly denied the existence of a "political question" doctrine based on separation of powers in the *Nicaragua Case*.<sup>30</sup> Nonetheless, the ICJ has employed an "arsenal of techniques and devices" performing the same function as such a doctrine but under other names. Much as Bickel described these techniques as alternatives along a continuum of abstention in the jurisprudence of the U.S. Supreme Court,<sup>31</sup> the ICJ has, in exercising its powers of review without invoking a distinct political question doctrine, abstained in ways that perform the same function as the political question doctrine.

In one respect, however, the Bickelian approach to understanding the ICJ's exercise of its power of judicial review may be misleading. Bickel's version of the machinery of abstention dealt only with contentious cases, given the limit of the jurisdiction of U.S. courts only to concrete cases and controversies.<sup>32</sup> Accordingly, the building blocks for the Bickelian machinery of abstention derive from Frankfurter's common law faith that "[e]very tendency to deal with constitutional questions abstractly . . . to formulate them in terms of barren legal questions, leads to dialectics, to sterile conclusions unrelated to actualities."<sup>33</sup> These concepts may well be relevant to the ICJ's exercise of jurisdiction in contentious cases where, in addition to the requirement of acceptance of the ICJ's subject matter and personal jurisdiction, the ICJ Statute further

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29. See discussion *infra* Part III.C. But see Gordon, *Legal Disputes*, *supra* note 25, at 183, 202 (arguing there is no justification for a justiciability doctrine to prevent the ICJ from deciding cases because "checks and balances [are] written into the structure of government that the Constitution—but not the Charter or Statute—creates").

30. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 433–35 (Nov. 26) (rejecting a separation of powers rationale advanced by the United States under which the ICJ would be barred from reviewing questions of international peace and security that are "textually committed" to the Security Council under the U.N. Charter). See also Oscar Schachter, *Disputes Involving the Use of Force*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra* note 25, at 223, 238–39 (endorsing the ICJ's rejection of an international political question doctrine, although recognizing that "the question of the propriety of judicial abstention in these kinds of cases does not lend itself to categorical answers. It is a delicate and complex problem on which reasonable persons can well differ.").

31. See BICKEL, *supra* note 1, ch. IV *passim*.

32. See BICKEL, *supra* note 1, at 113–118 (discussing *Hayburn's Case*, 2 Dallas 409 (1792), and the episode in 1793 known as the Correspondences of the Justices, setting forth the doctrine that the U.S. Supreme Court does not render advisory opinions).

33. Felix Frankfurter, *Advisory Opinions*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 1, 475, 478 (1930) (quoted in BICKEL, *supra* note 1, at 115–16).

requires that the dispute be a "legal disput[e]." <sup>34</sup> Accordingly, the ICJ has fashioned limiting doctrines on the exercise of its jurisdiction under the rubric of admissibility, such as standing and the absence of a necessary third party, <sup>35</sup> that it has used to abstain in the Bickelian mode. <sup>36</sup> However, drawing in part from constitutional traditions in civil law countries that are more open to abstract review <sup>37</sup>—that is, the exercise of judicial review in the absence of an actual case or controversy involving discrete facts to which the challenged legislative act is applied <sup>38</sup>—the ICJ's jurisdiction also extends to the issuance of advisory opinions. Although the ICJ's jurisdiction to render advisory opinions requested by the United Nations' Security Council or General Assembly, or their delegates, is nominally discretionary, <sup>39</sup> the ICJ nonetheless has taken the view that it should ordinarily grant requests that it give advisory opinions. <sup>40</sup> Yet even

34. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2; see also ARTHUR EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE 1946-1996*, at 127, 138-39 (1996) (quasi-official history prepared by the Chief Librarian of the Registry of the Court). The ICJ's predecessor had defined "a dispute" as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

35. See EYFFINGER, *supra* note 34, at 138-39.

36. See discussion *infra* notes 43-57 (discussing standing) and 67-109 (noting the indispensable party doctrine). But see Gordon, *Legal Disputes*, *supra* note 25, at 198-202 (arguing that the concept of "legal dispute" is non-discretionary).

37. See, e.g., Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 41 (Donald W. Jackson & C. Neal Tate eds., 1992) (discussing receptivity of civil law systems to abstract review). Unlike civil law countries, which in some cases permit abstract review at the request of less than a majority of the members of the legislative body, *id.* at 45, the advisory jurisdiction of the ICJ requires a request by the Security Council, the General Assembly, or by an organ or specialized agency authorized to do so by the General Assembly. See U.N. CHARTER art. 96; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65. Arguably, the advisory jurisdiction is thus protected from the politicization that might follow its use to continue a policy debate initially lost by a legislative minority, as is apparently often the case in abstract review under civilian constitutional systems. See Stone, *supra*, at 54-55 (resulting in the diminished legitimacy for the reviewing body, particularly in the French case, where the inaccurately named French Constitutional Court functions as an additional legislative chamber).

38. See Stone, *supra* note 37, at 42.

39. Article 65(1) of the Statute of the ICJ provides: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65, para. 1. The ICJ has described Article 65(1) not as an "enabling" provision but rather as one that "leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so." *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, 35 I.L.M. 809, 818 [hereinafter *Request of General Assembly*] (advisory opinion of ICJ responding to request made by the General Assembly at its forty-ninth session).

40. The Court stated its views, in language it has repeated again and again: "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65, 71 (Mar. 30).

in its advisory opinions, the Court has developed tools for declining to answer and, if need be, answering in a way that itself poses questions for a considered judgment of the transnational political process.

This article will describe how the World Court has abstained in a way that not only expresses its commitment to principled government but also implements a coordinate, participation-inducing agenda. The article argues that the most recent jurisprudence of the ICJ manifests an acceleration of this tendency in response not only to the need to conserve judicial resources in light of the increased use of the Court by States,<sup>41</sup> but also, and more significantly, to the enhanced law-making activity of the political organs of the U.N.<sup>42</sup>

Part I will discuss the ICJ's engagement in the South-West Africa/Namibia cases as a model for the role it must now undertake. In particular, it describes the ICJ's use of the standing doctrine. Part II turns to the ICJ's recent jurisprudence concerning the status of East Timor, which may well represent the early stages of a dialogue not unlike the one stimulated by the ICJ's opinions concerning Namibia. Specifically, it describes the ICJ's use of a version of the "necessary party" concept. Part III turns to a recent trilogy of nuclear weapons cases, both contentious and advisory opinions, in which the ICJ discharged both its "grand" responsibility to articulate principles and its "dialogic" function of stimulating constitutional debate at the political level. It describes how the ICJ employed techniques of abstention relating to law of the case, delegation, and vagueness to avoid undercutting an emerging constitutional debate in the transnational community over the status of nuclear weapons. In sum, in the nuclear weapons opinions, the ICJ found that either the wrong party was present, the right party was absent, or that the wrong issue was litigated. The article concludes that the ICJ's increasing use of this "arsenal of devices" is a necessary and welcome phenomenon provided, however, that the ICJ in exercising its power to abstain continues both to fulfill its "grand" responsibility to articulate principle and discharge its Socratic obligation to stimulate reasoned dialogue.

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41. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. General List No. 93 (July 8, 1996) at para. 31 [hereinafter *Request of the World Health Organization (WHO)*] (separate opinion of Judge Oda); see also Keith Hight, Comment, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT'L L. 646, 654 (1991) ("[T]he Court, like a phoenix, appears to have emerged from the ashes of Nicaragua.").

42. See Alvarez, *supra* note 16, at 20-24.

## I. A PARADIGM CASE FOR PRUDENTIAL ABSTENTION—SOUTH-WEST AFRICA/NAMIBIA AND STANDING

The South-West Africa cases involved both requests for advisory opinions and contentious cases over nearly a twenty-year period. At each step of the way, the ICJ articulated principle and posed questions for response by the international political community. Initially, the ICJ faced the question of the survival of the mandate created under the League of Nations under which South Africa had undertaken responsibilities to govern the then non-self-governing territory of South-West Africa (later Namibia) for the benefit of its inhabitants. South Africa's obligations were held to subsist, notwithstanding the dissolution of the League of Nations and South Africa's refusal to enter into a trusteeship agreement with the United Nations as successor to the League.<sup>43</sup> A few years later, by validating the General Assembly's decision to establish a procedure to grant oral hearings to petitioners on matters relating to the mandate, the ICJ confirmed the General Assembly's power to supervise the continued implementation of the mandate. These powers were held to include the right not only to exercise the exact degree of supervision actually exercised by the League during its existence, but also if the General Assembly so chose to exercise whatever powers the League may have had by virtue of the mandate. This interpretation enabled the General Assembly more effectively to determine the compliance of South Africa with its international obligations.<sup>44</sup> By validating the General Assembly's capacity to exercise the full powers of supervision inherent in the mandate, the ICJ opened the door in practical terms for the General Assembly to determine that South Africa had breached the mandate both in its failure to discharge its responsibilities toward the inhabitants of the territory and in its disregard of its responsibilities toward the General Assembly. Accordingly, because the League possessed the power to terminate the mandate in the event that South Africa materially breached its obligations, the ICJ's reasoning enabled the General Assembly ultimately to terminate the mandate.<sup>45</sup>

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43. See *International Status of South-West Africa*, 1950 I.C.J. 128 (July 11).

44. See *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, 1956 I.C.J. 23 (June 1).

45. See *Vienna Convention*, *supra* note 27, art. 60, para. 1 (material breach of a bilateral treaty, in this case between the League and United Kingdom and their successors, respectively, the General Assembly and the Republic of South Africa, giving rise to the right of the non-breaching party to terminate).

Yet, because the ICJ reasoned from the premise that the mandate was a treaty whose obligations subsisted notwithstanding the dissolution of the League of Nations, the door also was left open for States, as parties themselves to the League and the mandates created thereunder, to assert directly what legal rights they might have concerning South Africa's performance of its obligations. Liberia and Ethiopia, as the only two self-governing African States during the life of the League, attempted to seize the opportunity in 1960, applying to the Court for a ruling that South Africa had breached the mandate, but also seeking a determination concerning "the continued existence of the Mandate."<sup>46</sup> At the preliminary objections phase of the proceeding in 1962, the ICJ affirmed that it had jurisdiction. Given that both Ethiopia and Liberia's objections as to South Africa's performance of its obligations under the mandate constituted a "legal dispute" within the meaning of Article 38(1) of the Statute of the Court,<sup>47</sup> and the dispute resolution provisions of the mandate, which had conferred jurisdiction upon the Permanent Court of International Justice (PCIJ), and thus by operation of Article 37 of the Statute, the ICJ jurisdiction was clear.<sup>48</sup> The ICJ rejected the argument that dissolution of the League undercut the standing of any State, formerly a member of the League, to assert a legal interest in relation to the performance of the mandate.<sup>49</sup>

Nonetheless, at the next phase of the proceeding in 1966, the ICJ held that the particular obligations under the mandate at issue in Ethiopia and Liberia's applications did not involve duties South Africa owed to States as such but rather only those owed earlier to the League of Nations as a separate juridical entity created by States (and now to the League's successor).<sup>50</sup> Liberia and Ethiopia thus lacked standing as to the particular legal interests they sought to assert.<sup>51</sup>

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46. South-West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 321 (Dec. 21) (reporting filing of Applications in the Registry of the Court on November 4, 1960). These two African States were the only majority black-ruled African members of the League, and thus, were the only African States in theory legally capable of asserting legal interests in the mandate derived solely from original rights under the League mandate. *But see infra* note 53.

47. *See South-West Africa, supra* note 46, at 328 (finding that there was no doubt about the existence of a dispute between the Parties before the Court).

48. *See id.* at 329-33.

49. *See id.* at 334 (stating that League of Nations intended mandates to continue after the end of its own existence).

50. *See South-West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 22-26 (July 18).

51. The ICJ reached its conclusion by categorizing South Africa's obligations under the mandate as comprising two distinct classes: obligations relating to South Africa's "conduct" in the territory, owed initially to the League; and obligations involving "special interests" of the members of the League directly or in relation to the treatment of their nationals. *Id.* at 49-50.

The effect of this standing ruling was to foreclose binding review of South Africa's discharge of its obligations with respect to the people of Namibia, since only contentious cases between States benefit from *res judicata* effect under Article 59 of the Statute.<sup>52</sup> Admittedly, the Court might have circumvented the narrow standing theory that prevailed in its holding, perhaps by viewing Ethiopia and Liberia's claims as appropriate assertions of the rights of others. For example, *jus tertii*, which applies in cases where no other party is capable of asserting the legal interests implicated, could have been utilized since neither the United Nations' organs nor Namibia, neither of which were States, was able to bring a contentious case before the Court.<sup>53</sup> Instead, although only through the tie-breaking, or "casting," vote of the President of the Court, Judge Spender,<sup>54</sup> the ICJ chose not to determine whether South Africa had breached its obligations or to address, as Liberia and Ethiopia had sought, the implications of South Africa's breach for "the continued existence of the Mandate."<sup>55</sup> Instead, the ICJ's abstention directed these questions to the international political community, inviting it to answer through a prudential judgment applying the principles the ICJ articulated in its earlier Namibia jurisprudence.

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In the merits phase of the proceeding, the Court concluded only the former obligations were implicated in the dispute, and, in a perfect Hohfeldian syllogism, former Member States of the League did not have the right to seek the enforcement of legal duties not owed to them. *See id.* at 50; *see generally* Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1914).

52. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 59.

53. Indeed, the Court subsequently reversed the practical effect of its standing holding in the South-West Africa cases by identifying a class of duties, including obligations of a State in respect of the treatment of its own nationals, that are owed to all States—that is, obligations *erga omnes*. *See* Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter *Barcelona Traction*] (rejecting the Belgian government's application espousing the claim of Belgian shareholders of a Canadian company whose property was allegedly expropriated because the claim was held by the company itself as a distinct juridical entity and, therefore, was espousable only by Canada). The *erga omnes* construct seems likely to be invoked in the same kinds of cases in which a *jus tertii* standing rule would be useful. Indeed, as a noted American constitutional scholar has argued, many cases of *jus tertii* are better understood as first-party cases, where the putative third party actually holds the right to interact with the first-party rightholder as provided by the substantive right at issue. *See* Henry Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 297–310 (1984) (discussing "interactive" liberty interests). However, in the context of the overall structure of the international legal system, which historically has taken a narrow view of third-party rights, it may well fit better in the legal landscape. *See generally* CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* (1993) (discussing the classic *pacta tertiis nec nocent nec prosunt* rule, under which treaties do not bind and or give legal rights to non-parties except as expressly varied by the parties with the consent of non-parties, and the rule's relation to other contexts, such as international judicial procedure); *cf.* Vienna Convention, *supra* note 27, arts. 36–38 (setting forth relationship of third parties of a treaty).

54. *See* South-West Africa, *supra* note 50, at 51 (declaration of Judge Spencer).

55. South-West Africa, *supra* note 50, at 18.

The standing holding in the South-West Africa cases might be explained by the ICJ's recognition of the limits of its powers and need to preserve its institutional credibility. It might have been disastrous for the Court to reach the merits yet see its decision ignored by the major powers who alone were capable of compelling South Africa's compliance through Security Council action.<sup>56</sup> Yet, the ICJ's abstention was also not without political risk. Arguably, the abstention alienated the ICJ from the newly independent States. Indeed, this risk was particularly acute in light of the ICJ's holding three years earlier that it could not adjudicate the merits in the *Case Concerning the Northern Cameroons*, where the ICJ concluded that the General Assembly's termination of its Trusteeship Agreement with the U.K. mooted the Republic of Cameroon's objection to the procedure under which the U.K. united Northern Cameroons with Nigeria.<sup>57</sup>

Yet, the Court's abstention in the South-West Africa cases is better understood in light of the changing balance of political power in the United Nations—a transformation of international politics that made the ICJ's embarking on a dialogue with the political organs of the U.N. likely, for the first time, to achieve an outcome that accorded with the principles of the U.N. Charter.<sup>58</sup> With decolonization during the 1960s, the emerging majority of states in the General Assembly reflected political views much less sympathetic to the continued practice of apartheid in Namibia as well as the continuing frustration of the Namibian people's right to self-determination.<sup>59</sup>

Immediately after the standing decision, the General Assembly adopted Resolution 2145 (XXI), which purported to terminate the mandate and declare the continued presence of South Africa in Namibia illegal.<sup>60</sup> It took the Security Council only until 1970 when it, too, in Resolution 276 declared the continued presence of South Africa in Namibia illegal.<sup>61</sup> Both political organs of the international community had now engaged in the debate compelled by the ICJ's earlier abstention, and with the Security Council's request for an advisory opinion on the

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56. See generally W.M. Reisman, *International Non-Liquet: Recrudescence and Transformation*, 3 INT'L LAW. 770, 773 (1969) ("The Court may have felt that any decision would be ineffective.").

57. See *Case Concerning the Northern Cameroons* [Cameroon v. U.K.], 1963 I.C.J. 15 (Dec. 2).

58. See U.N. CHARTER arts. 1, 2 (purposes and principles); *id.* arts. 55, 56 (human rights provisions); *id.* arts. 73, 74 (declaration regarding non-self-governing territories).

59. See generally SOHN, *supra* note 27.

60. See G.A. Res. 2145 (XXI), U.N. GAOR, 21st Sess. (1966).

61. See S.C. Res. 276, U.N. SCOR, 25th Sess., U.N. Doc. S/RES/276 (1970).



legal consequences for States of South Africa's defiance of Resolution 276, the ICJ was asked the narrow question of whether the Council's action, based as it was on the General Assembly's earlier decision, exceeded the powers of the United Nations.<sup>62</sup> The ICJ's answer affirmed the principled criteria it had set forth in the earlier Namibia decisions regarding South Africa's own behavior. The mere fact that the ICJ decision lacked *res judicata* effect, as it would have pursuant to Article 59 of the Statute of the Court for the contentious South-West Africa cases, does not undercut its significance as an instance of authoritative judicial review. The precedential impact of advisory opinions is at least as great as that of contentious cases.<sup>63</sup>

The ICJ's advisory opinion also confirmed the mechanisms improvised by the General Assembly and the Security Council to terminate the mandate. First, the ICJ confirmed the primacy of the Council for Namibia—which the Assembly had created as an organ of the U.N. responsible for Namibia—in the management of Namibia's resources by invalidating all legal claims of third parties, such as investors relying on South Africa's mandate for Namibia, as inconsistent with the duty of States not to recognize South Africa's continued unlawful occupation.<sup>64</sup> Second, the ICJ confirmed the General Assembly's expansion of its law-making power when it validated the Assembly's determination that South Africa breached the mandate. This encouraged the Assembly in future cases to legislate community norms through so-called declarations, notwithstanding the fact that its sole textually committed power is to make "recommendations."<sup>65</sup> Third, the ICJ validated the Security Council's expansion of its powers to take binding action pursuant to Articles 24 and 25 of the Charter, even in the absence of a "threat to the peace"

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62. See S.C. Res. 284, U.N. SCOR, 25th Sess., U.N. Doc. S/RES/284 (1970).

63. See MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 165–71 (1996) (then sitting Judge of the Court acknowledging the absence of any formal doctrine of *stare decisis* in international adjudication but maintaining, nonetheless, that earlier pronouncements of the ICJ, whether in the contentious or advisory modes, carry weight in the continuing process of reasoned decision making).

64. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 43–48 (June 21) [hereinafter *Legal Consequences for States*] (approving termination of Mandate by General Assembly); *id.* at 54 (invalidating legal title of South Africa); *id.* at 51–54 (approving termination of Mandate by Security Council); *id.* at 55–56 (imposing obligation on Member States to refrain from entering into economic relationship with South Africa on behalf of Namibia).

65. U.N. CHARTER art. 10; see generally Jonathan I. Charley, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (concluding that the evolution of informal international law-making process may result in the increased creation of international norms "endowed with greater legitimacy").

under Chapter VII of the Charter.<sup>66</sup> Thus, the ICJ first stimulated and later validated constitutional decisionmaking by the U.N.'s political organs, which in applying the law of the U.N. Charter to meet the needs of international community may have transformed the transnational political community's understanding of the Charter's meaning and the U.N.'s powers.

An advisory opinion that did not validate the constitutionality of the means selected by the political process might well have condemned the ICJ to a continuation of the obscurity and neglect of the political community it suffered following the standing decision in the second phase of the *South-West Africa Case*.<sup>67</sup> The Court, having initiated a constitutional dialogue between the General Assembly and Security Council, a debate that became an international cause célèbre, was in no position to reject the conclusions of that dialogue. Having made its Faustian bargain not to discharge its "duty to decide," the Court now was compelled to observe it. Yet this bargain serves, I believe, as a useful paradigm case for assessing the validity of abstention by the Court from pronouncements purporting to apply legal principles to resolve issues definitively, particularly where the activation of the transnational political process may well be better calculated to achieve prudential judgments that accord with principle and, at the same time, stiffen the sinews of transnational democracy by forcing their strenuous exercise.

## II. ABSTENTION IN THE ABSENCE OF NECESSARY PARTIES—THE PASSAGE FROM THE CORFU CHANNEL TO THE TIMOR GAP

Because the ICJ originated from arbitral practice prior to the First World War,<sup>68</sup> its jurisdiction in contentious cases is, like that of any arbitral body, founded on the consent of the parties.<sup>69</sup> Thus, in its very first contentious case, the *Corfu Channel Case*, it was argued that the absence of Yugoslavia and Greece from the proceedings precluded adjudication, since Britain accused Yugoslavia and Albania accused Greece of laying mines off the Albanian coast which damaged British

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66. Legal Consequences for States, *supra* note 64, at 52.

67. In the five-year period following 1966 until the announcement of the opinion in Legal Consequences for States, only one dispute was brought before the Court, *i.e.*, North Sea Continental Shelf [F.R.G. v. Den.; F.R.G. v. Neth.], 1969 I.C.J. 3 (Feb. 20). The dominant impression among newly independent States was clearly that the Court was not receptive to their concerns.

68. See generally EYFFINGER, *supra* note 34, at 40–71 (chronicling development from the first Hague Peace Conference to the Permanent Court of International Justice).

69. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36.

warships in transit through the Channel.<sup>70</sup> Nonetheless, the ICJ held this no barrier to adjudication on the merits, notwithstanding Greece and Yugoslavia's refusal to consent to jurisdiction. The ICJ was able to resolve the case on the merits on the theory that Albania breached its own duties as a coastal State not to permit the impairment of the U.K.'s right of innocent passage through Albania's territorial waters, irrespective of whether the mines were originally laid by a third State.<sup>71</sup>

In the first case in which the Court actually abstained because of the absence of a necessary party,<sup>72</sup> the *Case of Monetary Gold Removed from Rome in 1943*, the ICJ concluded that it could not adjudicate the merits because the absent party, Albania's, "legal interests would . . . form the very subject-matter of the decision."<sup>73</sup> The Court assumed, perhaps incorrectly, that it was undisputed that Albania held title to the gold.<sup>74</sup> It did not seem to matter that the ICJ could have avoided prejudicing Albania's interests by simply limiting itself to determining only which of the parties to the dispute before the Court was, as between the two alone, the superior claimant. Neither did it matter that the ICJ might have resolved the situation by permitting, as would a U.S. federal court, the intervention of the absent party.<sup>75</sup> In rejecting the U.K.'s argument that Albania's

70. See *Corfu Channel* [U.K. v. Alb.] (Merits), 1949 I.C.J. 4, 15-17, 29 (Apr. 9).

71. See *id.* at 17. See also CHINKIN, *supra* note 53, at 199-212 (discussing this case and its progeny).

72. One might compare this judge-made doctrine with Federal Rule of Civil Procedure 19(b), which provides that when certain criteria are satisfied and a person "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." FED. R. CIV. P. 19(b). In addition, under Federal Rule of Civil Procedure Rule 19(a), the court must order joinder of this "necessary party" when:

- (1) in his absence complete relief cannot be accorded among those already parties, or
- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

FED. R. CIV. P. 19(a); see generally WRIGHT, *supra* note 28, §§ 70-71 (discussing the classification and joinder of parties). Nothing in the ICJ Statute, however, explicitly provides the ICJ with the power to order joinder of a necessary party, or because of the consequences joinder would have on the ICJ's jurisdiction, to dismiss an application because joinder would defeat jurisdiction or the failure to join the absent party would be manifestly unjust.

73. *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., and U.S.), 1954 I.C.J. 19, 32 [hereinafter *Monetary Gold*].

74. See *id.* But see CHINKIN, *supra* note 53, at 200 n.57 (questioning whether Italy may have had independent rights to the gold, notwithstanding an arbitrator's prior finding in favor of the Albanian claim).

75. The Statute of the ICJ ostensibly distinguishes between permissive intervention and intervention as of right. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 62, para. 1 ("Should a state consider that it has an interest of a legal nature which may be affected by

absence should not be a barrier to adjudication because Albania was free to request intervention, the ICJ argued that this rationale would make the ICJ's determination of its own jurisdiction dependent on uncertain events.<sup>76</sup>

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the decision in the case, it may submit a request to the Court to be permitted to intervene."); cf. Federal Rule of Civil Procedure 24(b) ("Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.").

Article 63(1) and (2) of the ICJ Statute provide: "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith," and "Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 63, paras. 1, 2. Compare the ICJ Statute with the Federal Rules of Civil Procedure:

Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a).

76. See *Monetary Gold*, *supra* note 73, at 32. Chinkin defends the ICJ's conclusion that the defect in jurisdiction could not have been cured by permitting Albania's intervention pursuant to Article 62 of the Statute. CHINKIN, *supra* note 53, at 200. She suggests that intervention should only allow "a third State to participate in proceedings that have already been legitimately commenced, which is not the case where there is no jurisdiction." *Id.* This point seems to be premised on the view that the Court lacks discretion under the *Monetary Gold* doctrine whether or not to abstain in the first place. If, however, as suggested below, the *Monetary Gold* abstention doctrine also is grounded on prudential considerations and admits a degree of flexibility in its use, then the permissibility of intervention might be a legitimate criterion in whether the absence of a party should preclude adjudication. See *infra* note 106 (discussing separate opinion of Judge Shahabuddeen in *East Timor*).

The flexibility of the ICJ's intervention practice further suggests the plasticity of the rationale underlying *Monetary Gold*. Compare *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 215 (Oct. 4) (denying El Salvador's request, even for a hearing in a case arguably involving multilateral treaty interpretation under Article 63 of the Statute) with *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, Application for Permission to Intervene, 1990 I.C.J. 92 (Sept. 13) (granting Nicaragua's application in a case involving only "an interest of a legal nature" under Article 62 of the Statute). Others have disagreed as to whether these decisions reflect legal indeterminacy or merely different position, one of which is more authoritative. Compare SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 190 (1993) ("So extensive indeed are [the] ambiguities and obscurities [of the relevant article of the statute], that they alone give the Court a broad discretion as to how it will deal with any case of intervention, through processes of interpretation in addition to its formal discretion under the Statute.") with Stephen M. Schwelb, Book Review, 89 AM. J. INT'L L. 835, 836 (1995) (reviewing CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW (1993)) (noting Chinkin's argument that the ICJ 1990 decision by a Chamber of the Court may well have lesser precedential value than the full Court's 1984 decision not to permit intervention). A third position suggested by reading the *Monetary Gold* principle as prudential is that the ICJ's intervention doctrine could also usefully be analyzed as yet another weapon in the "arsenal of devices" for prudential abstention. But see ROSENNE, *supra*, at 196 (writing that "intervention in international legal proceedings, especially those before the International Court

Given the unique facts of the *Monetary Gold* case, and the weakness of its doctrinal underpinnings, it was commonly thought that its reasoning had little precedential value.<sup>77</sup> This view seemed confirmed in 1992, when in *Certain Phosphate Lands in Nauru*, the Court refused to apply *Monetary Gold* in a close case.<sup>78</sup> Nauru had been the subject of joint administration by Australia, New Zealand, and the United Kingdom, and arguably any decision on the merits that Australia had breached its obligations under a mandate and later trusteeship might well have determined whether New Zealand and the United Kingdom, which declined to intervene, had also breached their obligations.<sup>79</sup> The legal question in this regard was whether Australia, New Zealand and the United Kingdom's liability for breach of obligations as Administering Authorities was joint, implying perhaps that a determination of breach by one would also imply breach by the others, or joint and several, suggesting that adjudication could proceed against one without necessarily entailing liability for the others.<sup>80</sup> In any event, the Court declined to resolve this question in the preliminary objection's phase, deferring it until adjudication on the merits,<sup>81</sup> and perhaps for all time when the issue was mooted upon the parties reaching a settlement.<sup>82</sup>

Thus, *Certain Phosphate Lands in Nauru* revealed the limits of the rationale underlying the abstention rule of *Monetary Gold*. If the decision in *Monetary Gold* was grounded on the importance of not purporting to bind a non-party to a contentious case, then Article 59 of the statute's plain text dictates the conclusion that a non-party could never in subsequent litigation before the Court be bound by the results of a former adjudication to which it was not a party.<sup>83</sup> If, however, the concern

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of Justice, with sovereign States as bar, cannot be assessed on a scale of values derived from the experience of internal legal systems or any supra-national legal system").

77. See ROSENNE, *supra* note 25, at 431; see also CHINKIN, *supra* note 53, at 200 n.59 (stating that the *Monetary Gold* facts are specific with little precedential value).

78. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240, 259-62 (June 26) [hereinafter *Certain Phosphate Lands*].

79. See *id.* at 262. For the texts of the relevant agreements, see Nauru Island Agreement Act, 1919 (Austl.); Nauru Island Agreement Act, 1920, 10 & 11 Geo. 5, ch. 27 (Eng.); Trusteeship Agreement for the Territory of Nauru, Nov. 1, 1947, 10 U.N.T.S. 3; Agreement Relating to Nauru, Nov. 26, 1965, Austl.-N.Z.-U.K., 1965 Austl. T.S. No. 20; Agreement to Terminate the Nauru Island Agreement 1919, Feb. 9, 1987, Austl.-N.Z.-U.K., 1987 Austl. T.S. No. 8.

80. See *Certain Phosphate Lands*, *supra* note 78, at 262.

81. See *id.*

82. See *Australia-Republic of Nauru: Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru*, 32 I.L.M. 1471 (1993).

83. See SHAHABUDEEN, *supra* note 63, at 63 ("Article 59 . . . is limited to defining the legal relations of the parties only.").

underlying the rule is whether an adjudication in which the third party was not involved would have some precedential effect as a practical matter,<sup>84</sup> then the *Monetary Gold* formulation is inappropriate, because it treats as a binary question an issue that is rather one of degree. Every State has, to some extent, an interest in the development of international law by the Court since the law the Court develops may well affect particular legal interests of States in present or future disputes.<sup>85</sup> While this general interest in the development of international law clearly could not warrant intervention by any or all States,<sup>86</sup> it does suggest that the Court's use of the *Monetary Gold* doctrine cannot be understood solely in terms of the *res judicata* effect of ICJ decisions.

If the Court's abstention on the ground of the absence of a necessary party admits discretion in determining whether a party is necessary, then the *Monetary Gold* doctrine can be reformulated in a way that facilitates the exercise of this discretion based on the role the adjudication plays in the larger legal system. The discretionary character of the *Monetary Gold* doctrine became manifest in the recent *Case Concerning East Timor*,<sup>87</sup> where for the first time since *Monetary Gold* the ICJ declined to exercise jurisdiction because of the legal interest of an absent third party.<sup>88</sup> The legal dispute, in Portugal's view, concerned the Treaty of 1989 between Australia and Indonesia concerning the Timor Gap—Zone of Cooperation, which delimited the continental shelf off the coast of East Timor.<sup>89</sup> Portugal, the former Administering Authority of the U.N. Trusteeship over East Timor, claimed that Australia, in entering into the agreement, violated not only the rights of the people of East

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84. See 1 OPPENHEIM'S INTERNATIONAL LAW 41–42 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); see also SHAHABUDEEN, *supra* note 63, at 67–69, 107–09.

85. See SHAHABUDEEN, *supra* note 63, at 55–66, 107–09. The concern is manifest and respected in the Court's advisory opinion practice, where States are free to make submissions to the ICJ to facilitate its work. See Revised Rules of the Court, 1977 I.C.J. Acts & Docs. art. 63, para. 2 (stating that if "a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court," it may do so).

86. See SHAHABUDEEN, *supra* note 63, at 55–66 (discussing, *inter alia*, preparatory work of PCIJ Statute and the rejection of the view that intervention should be as of right generally rather than, as ultimately agreed, only in the narrow case of disputes concerning the interpretation of a multilateral treaty to which the intervening State was also a party); cf. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE arts. 62, 63.

87. See *East Timor* (Port. v. Austl.), 1995 I.C.J. 90 (June 30).

88. See generally Peter H.F. Bekker, Casenote: *East Timor* (Port. v. Austl.), 90 AM. J. INT'L L. 94, 98 (1996) (noting that the "*East Timor* Judgment appears to contradict what some observers may have regarded as a trend toward 'judicial activism' in establishing jurisdiction"). Accord James A.R. Nafziger, *Thomas J. Bodie's Politics and the Emergence of an Activist International Court of Justice*, 20 LEGAL STUDIES FORUM (forthcoming) (book review).

89. See *East Timor*, *supra* note 87, at 94.

Timor to self-determination by recognizing Indonesia's unlawful occupation—rights of an *erga omnes* character Portugal was entitled to assert<sup>90</sup>—but also Australia's separate duty to Portugal not to impede Portugal's fulfillment of its obligations as Administering Power.<sup>91</sup>

The Court observed that after Indonesia ejected Portuguese authorities from East Timor in December 1975, Security Council Resolution 384 called on Indonesia to withdraw and "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination."<sup>92</sup> In addition, Resolution 389 (1976) called upon "all States to cooperate fully with the United Nations to achieve a peaceful resolution of the existing situation."<sup>93</sup> The ICJ noted that in the days following the ouster, the General Assembly explicitly referred to Portugal as "the Administering Power," notwithstanding the Indonesian occupation.<sup>94</sup> Conceding that these facts gave rise to a "dispute" between Portugal and Australia within the meaning of Article 38(1) of the Statute,<sup>95</sup> the Court nonetheless held that Portugal's claim "cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so."<sup>96</sup> An absent third party's legal interest thus precluded adjudication.

Nonetheless, in coming to its conclusion, the Court performed its "grand" function of articulating the relevant international legal principles by affirming that, "for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people have the right to self-determination."<sup>97</sup> Note that the Court's formulation employed a reminder that the *res judicata* effect of its decision was limited to the two parties over whom it had jurisdiction, even if under the *Monetary Gold* rule against admissibility it could not fully adjudicate the merits of the dispute. Yet, East Timor is self-governing, as occupied by Indonesia, or non-self-governing, and the Court clearly held that it is non-self-

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90. See *Barcelona Traction*, *supra* note 53.

91. See *East Timor*, *supra* note 87, at 94.

92. S.C. Res. 384, U.N. SCOR, 30th Sess., U.N. Doc. S/RES/384 (1975); see also *East Timor*, *supra* note 87, at 96.

93. S.C. Res. 389, U.N. SCOR, 31st Sess., U.N. Doc. S/RES/389 (1976); see also *East Timor*, *supra* note 87, at 96.

94. *East Timor*, *supra* note 87, at 96 (citing G.A. Res. 3458 (XXX), U.N. GAOR, 30th Sess. A/RES/3485 collected in DOC A/10034 (1975)).

95. See *East Timor*, *supra* note 87, at 99–100.

96. *East Timor*, *supra* note 87, at 102.

97. *Id.* at 105–06.

governing.<sup>98</sup> How then could the Court's statement be read in any other way than as a verdict on Indonesia's legal interest in East Timor, the very matter the Court felt it would have to, and under *Monetary Gold* could not, address in adjudicating the merits of Portugal's claim against Australia?

Yet, if the principles stated in the Court's opinion ultimately vindicate the Portuguese claim and the rights of the East Timorese, the decision seems to make a mockery of the clear line of precedent the Court developed in *Barcelona Traction* and *Legal Consequences*. These precedents expanded standing to assert human rights, including the right to self-determination, and thus, allowed the court to require that States not cooperate in a violation of those rights.<sup>99</sup> Why then did the ICJ not proceed to the next step and declare invalid Australia's "de facto recognition" of Indonesia unlawful occupation of East Timor.<sup>100</sup>

This apparent inconsistency in the ICJ's jurisprudence could be resolved, as some of the judges of the Court seemed to realize, by reformulating *Monetary Gold* as a doctrine of prudential abstention. However, the debate found in the separate opinions of Judges Oda and Shahabuddeen reflects the ICJ's discomfort with the "arsenal of devices" for prudential abstention that the court had constructed for itself. Judge Shahabuddeen characterized the ground of inadmissibility asserted by the Court as a question of "balance," in which "what the Court has been doing was to identify some limit beyond which the degree to which the non-party State would be affected would exceed what is judicially tolerable."<sup>101</sup> Judge Oda, recognizing the elasticity of the *Monetary Gold*

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98. *See id.*

99. *See id.* at 142 (dissenting opinion of Judge Weeramantry) (arguing that dicta from *Monetary Gold* should be contained); Judge Weeramantry—a citizen of Sri Lanka, *see* EYFFINGER, *supra* note 34, at 335, which, like East Timor, lives in the shadow of a larger State whose mere mass challenges the existence of the smaller States surrounding it—poignantly observed:

The preliminary objection to the *jus standi* of Portugal calls into question the adequacy of the entire protective structure fashioned by the United Nations Charter for safeguarding the interests of non-self-governing territories, not yet in a position themselves to look after their own interests.

Australia's submission that it is not in breach of any international duty necessitates a consideration of State obligations implicit in the principle of self-determination, the very basis of nationhood of the majority of Member States of the United Nations.

East Timor, *supra* note 87, at 142–43.

100. East Timor, *supra* note 87, at 97 (noting statement of February 23, 1978 of Australian Minister for Foreign Affairs, to the effect that "we recognize the fact that East Timor is part of Indonesia, but not the means by which this was brought about").

101. *Id.* at 119, 120 (separate opinion of Judge Shahabuddeen).



principle, would have held that the case was inadmissible on standing grounds; namely, because the rights at issue related to those of a coastal State in maritime boundary delimitation, and whatever might be said of Portugal's legal rights in other respects, Portugal had long ceased to be the "coastal state" for purposes of the Timor Gap.<sup>102</sup>

The virtue of Judge Oda's approach is that it gives the appearance of a neutral, non-discretionary process of judicial decisionmaking; either the applicant has the status claimed, thereby entailing correlative rights, or the applicant does not. Judge Oda thus would have transformed the politically explosive question of the effects of Indonesia's refusal to come before the ICJ to answer for its conduct into a more technical, politically neutral question concerning the law of the sea. But as discussed above, Judge Oda's method also suffered from the vice of having been tried in the South-West Africa cases where the Court purported to divest itself of the power in contentious cases to review South Africa's performance of its obligations under the mandate.<sup>103</sup> Yet, if it became clear that the application of the *Monetary Gold* rule was, as Judge Shahaudeen suggested, a question of degree, Judge Oda may have felt the need to offer a depoliticized abstention solution to the case.

Even more revealing are the grounds upon which the ICJ exercised that discretion. Here it seems the Court felt the need not to anticipate prudential judgments of the political organs;<sup>104</sup> for, in rejecting Portugal's argument that the Security Council and General Assembly had already determined the non-existence of any rights Indonesia might assert,<sup>105</sup> the Court found that "it cannot be inferred . . . that [the General Assembly and the Security Council] intended to establish an obligation on third states to treat exclusively with Portugal as regards the continental shelf of East Timor."<sup>106</sup> The ICJ added that, even in the face of the 1989 Treaty and related measures, "no responsive action was taken either by

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102. *Id.* at 107, 118 (separate opinion of Judge Oda).

103. *See supra* text accompanying notes 43-54.

104. Judge Ranjeva, for example, explicitly alluded to the Court's need to refrain from "choosing between the practical measures which the interested states or the competent organs of the United Nations can take in order to solve the more general problem of East Timor." East Timor, *supra* note 87, at 133 (separate opinion of Judge Ranjeva).

105. Portugal argued that "the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the Administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence." *Id.* at 103.

106. *Id.* at 104. *But see id.* at 119, 123-24 (separate opinion of Judge Shahabuddeen) (arguing that, even if Portugal's interpretation of the Security Council and General Assembly resolutions were correct, he would hold that the *Monetary Gold* principle would apply, since the Court would still "be passing on Indonesia's legal interests").

the General Assembly or the Security Council.”<sup>107</sup> The ICJ thus refused to attribute legal significance to twenty-year old, potentially inconsistent,<sup>108</sup> pronouncements that, unlike the outpouring of General Assembly and Security Council activity that preceded the Court’s 1971 advisory opinion on the *Legal Consequences for States of South Africa’s Continued Presence in Namibia*, did not clearly express the recent and considered judgment of the political organs of the international community.<sup>109</sup>

The ICJ’s concern over the passage of time, like Bickel’s characterization of desuetude as a doctrine whose purpose is to assure political accountability by the law-making organs of government,<sup>110</sup> flows from its underlying view that the judicial role is not only to decide cases according to law but also to stimulate reasoned debate that ensures that the law the ICJ applies reflects the political community’s best judgment in the application of principles to its preferred policies. The Court’s reasoning thus implicitly invited the political organs to revisit the issue of East Timor in a more authoritative way. As it had in its standing decision in the second phase of the South-West Africa cases, the Court indirectly posed questions to the political organs of the U.N., that they might make their intentions clear.<sup>111</sup> Indeed, the conferral of the Nobel Peace Prize to East Timorese figures struggling to bring this issue to the world’s attention could be seen as part of the dialogue the Court’s decision has stimulated on how to permit the people of East Timor to exercise their judicially recognized right of self-determination.<sup>112</sup>

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107. *Id.* at 104.

108. The ICJ may also have been concerned by the gap between the positions of the General Assembly and Security Council, since the Council had called for the cooperation of “all” States in the Security Council’s efforts to resolve the issue while the General Assembly confirmed Portugal’s continuing special status as Administering Power. Compare S.C. Res. 384, *supra* note 92, paras. 3–4, with G.A. Res. 3485 (XXX), *supra* note 94.

109. Recognizing its centrality to the Court’s reasoning, Judge Weeramantry in dissent argued that “[t]here is no warrant in United Nations law” for attributing significance to the “lapse of time” and “supposedly diminishing support” for the Security Council and General Assembly’s resolutions. East Timor, *supra* note 87, at 155 (dissenting opinion of Judge Weeramantry).

110. See BICKEL, *supra* note 1, at 148–56, 223.

111. See *supra* text accompanying notes 51–61.

112. See, e.g., Keith Suter, *Nobel Hears East Timor*, BULL. ATOMIC SCIENTIST, Jan./Feb. 1996, at 47.

### III. ABSTENTION IN THE NUCLEAR WEAPONS TRILOGY

In the last two years, a trilogy of nuclear weapons cases has come before the ICJ,<sup>113</sup> and in each case the Court avoided pronouncements that would foreclose current or politically plausible future nuclear weapons activities by States under their own authority or pursuant to United Nations authorization. Each case illustrates the use of a distinct device for prudential abstention in which the ICJ performed its "grand" function of articulating principled criteria yet stimulating a dialogue in the international political community for making prudential judgments concerning the possession, testing, use or threat of use of nuclear weapons.

#### A. *Law of the Case and Mootness Redux—New Zealand v. France*

In 1974, the Court held that New Zealand's challenge to France's atmospheric testing of nuclear weapons in the South Pacific was mooted by France's binding unilateral declaration that it would discontinue such tests.<sup>114</sup> Moreover, while the *Nuclear Test Case* was pending, France withdrew from the treaty that had originally served as the basis for jurisdiction.<sup>115</sup> Under paragraph 63 of its opinion, however, the ICJ retained jurisdiction over the matter to the extent that "the basis" for its judgment was "affected."<sup>116</sup>

New Zealand maintained that the ICJ's jurisdiction was thus revived when France announced on June 13, 1995 that it would embark on a limited campaign of underground tests that would make possible the gathering of data necessary to France's undertaking a commitment to enter into a comprehensive test ban treaty.<sup>117</sup> New Zealand advanced the

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113. See generally Request for An Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests [New Zealand v. France] Cases, 1995 I.C.J. 288 (Sept. 22); Request of WHO, *supra* note 41; Request of the General Assembly, *supra* note 39.

114. See Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 475, 477 (Dec. 20) [hereinafter Nuclear Tests].

115. Paragraph 63 of the *Nuclear Tests Case*, which had reserved New Zealand's right to "request an examination of the situation," also specifically provided that "the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request." In theory, therefore, were France to resume atmospheric testing, the Court would again have jurisdiction. See Peter H.F. Bekker, *New Zealand challenge to underground testing by France in South Pacific—ICJ Judgment in 1974 Nuclear Tests Case (New Zealand v. France) confined to atmospheric testing—dismissal of New Zealand request to reopen that case*, 90 AM. J. INT'L L. 280, 282 n.16 (1996).

116. Nuclear Tests, *supra* note 114, at 477.

117. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22) [hereinafter Underground Nuclear Tests].

not implausible argument that, because the "basis" of the ICJ's judgment was France's decision no longer to conduct atmospheric tests that could cause environmental damage to New Zealand, and because in the intervening years it had become clear that France also could cause environmental damage through underground tests, the "basis" for the 1974 judgment was "affected."<sup>118</sup> The ICJ abstained, however, holding that the precise basis for its judgment was France's commitment not to undertake above-ground testing, rather than its general commitment relating to all nuclear tests.<sup>119</sup>

Yet, abstention hardly seemed necessary, since the broader interpretation suggested by New Zealand of the ICJ's reservation of jurisdiction would not have risked an expansion of its jurisdiction given the unique circumstances of the case.<sup>120</sup> In other words, it was as though the ICJ considered its earlier finding that France's commitment to cease atmospheric testing to be the "basis" for its judgment was a kind of "law of the case" to which the Court was now bound.<sup>121</sup> If so, the discretionary character of the ICJ's method becomes clear, for the "law of the case" doctrine serves policies of finality and judicial economy that may be ignored where a court, as the ICJ did here, faces new facts or a change in substantive law.<sup>122</sup>

Nonetheless, the ICJ performed its "grand" function of articulating relevant principles. Without any technical justification, in light of its own theory of the case,<sup>123</sup> the ICJ announced that "the present Order is without prejudice to the obligation of States to protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment."<sup>124</sup> This reminder no doubt was of relevance to States then negotiating the terms of a Comprehensive Test Ban Treaty, which France claimed it would be able to support because of the information it would obtain through the underground tests

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118. See Don MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L L.J. 1857, 1874 (1996) (account of New Zealand's Ministry of Foreign Affairs's Legal Adviser). *But see id.* at 1870 (reporting that New Zealand's Prime Minister, Jim Bolger, acknowledged that he was advised that "there would be considerable legal difficulty" for New Zealand in attempting to revive the case).

119. See *Underground Nuclear Tests*, *supra* note 117, at 306.

120. See *id.* at 309 (separate opinion of Judge Schwebel) (characterizing paragraph 63 as "singular"); *id.* at 383, para. 6 (dissenting opinion of Judge ad hoc Palmer) (describing the case as "a procedural species not seen before").

121. Cf. JAMES WM. MOORE, 1B MOORE'S FEDERAL PRACTICE AND PROCEDURE, para. 0.404 (1996) (discussing law of the case).

122. See *id.*

123. See *Underground Nuclear Tests*, *supra* note 117, at 285 (suggesting that the Court's comment was stimulated by the dissenting opinions of Judges Weeramantry and Judge ad hoc Palmer).

124. *Id.* at 306.

New Zealand had sought to block. It was as though the ICJ was reminding France, as well as all other nuclear weapon States seeking to preserve the option of underground testing, that any State testing nuclear weapons could not be indifferent to the implications of international environmental law.

B. *Speciality and the Request of the World Health Organization (WHO)—An Anti-Delegation Doctrine*

In what may well be the ICJ's version of *Marbury v. Madison*,<sup>125</sup> the Court abstained when the WHO sought an advisory opinion from the ICJ on the legality of the use by a State of nuclear weapons. This marks the first time in its history that the ICJ declined to respond to a request for an advisory opinion.<sup>126</sup> Article 65 of the Statute confers upon the ICJ the power to "give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."<sup>127</sup> Article 96(2) of the Charter provides that "specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions within the scope of their activities."<sup>128</sup> The General Assembly, exercising this power, authorized the WHO to "request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence."<sup>129</sup> But the ICJ interpreted Article 2 of the WHO Constitution to give the WHO competence only to "deal with the effects on health of the use of nuclear

125. See 5 U.S. (1 Cranch) 137 (1803) (exercising power of judicial review to invalidate an act of Congress purporting to grant the Supreme Court the power to exercise jurisdiction of a kind the Constitution itself did not permit the Court to exercise); see also Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 159-160, 160 n.48 (1995) (favoring a limiting construction of the WHO's competence that would be consistent with the duty under *Marbury v. Madison* to say what the law is but also avoid highly-intrusive, current "U.S.-style judicial review").

126. See Request of WHO, *supra* note 41, at para. 32 (holding that giving the advisory opinion was beyond the Court's jurisdiction). The PCIJ had in one case declined to exercise jurisdiction to render an advisory opinion. See Advisory Opinion No. 5, Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5. In that case, the PCIJ declined to exercise jurisdiction to render an advisory opinion, much as the ICJ later would in the contentious case setting of *Monetary Gold* and the *Case Concerning East Timor*, because an absent third party's legal interests would be affected. See *id.* at 5.

127. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65.

128. U.N. CHARTER art. 96, para. 2.

129. Agreement between the United Nations and World Health Organization, art. X, para. 2, U.N. Doc. A/348, reprinted in 1947-48 U.N.O.B. 919, U.N. Sales No. 1949.I.3 [hereinafter UN-WHO Agreement]. The UN-WHO Agreement was approved by the General Assembly, G.A. Res. 124(II), U.N. GAOR, 2d Sess., U.N. Doc. A/124 (1947), and by the First World Health Assembly, Res. WHA1.102, U.N. WHO, Official Records No. 10, at 59 (1948).

weapons,"<sup>130</sup> and it found that regardless of whether the use of nuclear weapons was legal, they would have the same consequences on health and the environment.<sup>131</sup> Therefore, the "legality" of the use of nuclear weapons was not a question within the "scope of [the] activities" of the WHO under Article 96(2) of the Charter,<sup>132</sup> thus placing it outside the ICJ's competence to render an advisory opinion under Article 65 of the Statute.

The ICJ's reasoning, however, drew upon yet another "device" in the "arsenal" for abstention. Arguably to avoid constitutional difficulty in interpreting the "scope of the activities" of the WHO, the Court expressly took account of the WHO's place in the U.N. system by applying the interpretive presumption that the General Assembly would not be assumed to authorize a specialized agency to address issues that are solely within the General Assembly's competence. A plausible argument might also be made that the ICJ authoritatively interpreted the Charter not to permit the General Assembly to delegate that responsibility, even for the limited purpose of seeking the advisory opinion of the ICJ.<sup>133</sup> The principle of speciality, the ICJ noted, dictates that international organizations "are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."<sup>134</sup> But in the context of the WHO, a specialized organ of the U.N., the ICJ transmuted the principle of speciality to hold that the WHO's international responsibilities could not:

encroach upon the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the

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130. Request of WHO, *supra* note 41, para. 21; *see also id.* at para. 20.

131. *See id.* at para. 21.

132. *Id.* at para. 22.

133. The Court stated that "any other conclusion would render virtually meaningless the notion of a specialized agency," suggesting that the Charter itself barred the General Assembly from delegating competence in this area to the WHO. But it also stated, "[i]t is therefore difficult to maintain that . . . the General Assembly intended" to do so, thus suggesting that its holding was limited to an interpretation of what the General Assembly did rather than of what the Charter could be read to permit it to do. *Id.* at para. 26. But in holding that the General Assembly resolution requesting an advisory opinion from the ICJ did not ratify the otherwise *ultra vires* WHO Request, the Court stated that both rationales were applicable:

[T]he Court does not consider that, in doing so, the General Assembly meant to pass upon the competence of the WHO to request an opinion on the question raised. Moreover, the General Assembly could evidently not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorize the specialized agencies to request opinions from the Court—limits which were reaffirmed in Article X of the relationship agreement . . . .

*Id.* at para. 30.

134. *Id.* at para. 25.

use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies.<sup>135</sup>

Although advisory opinion request of a specialized organ could take the form of a contentious case under Article 59 of the Statute, in which the legal interests of only the specialized agency were at stake,<sup>136</sup> the WHO's request also implicated the ICJ's concern over the effect of its pronouncements on absent parties, in this case the General Assembly.<sup>137</sup>

Yet, the ICJ again performed its "grand function" of articulating principle while stimulating continued constitutional dialogue. In the very act of refusing to render an advisory opinion, the ICJ pronounced on the legal relationship between the U.N. and the WHO, even though the U.N.-WHO Agreement expressly barred a request as to "questions concerning the mutual relations of the organization and the United Nations or other specialized agencies."<sup>138</sup> Ironically, to avoid rendering an advisory opinion the ICJ answered precisely the question that it could not have answered if it had rendered an advisory opinion. In interpreting the structural relationships between the U.N. and its organs so as to confirm the primacy of the U.N., the mode of review the Court employed recalled Bickel's suggestion that the nondelegation doctrine of U.S. constitutional law,<sup>139</sup> as applied to the exercise of the subpoena power by congressional committees, serves to assure political accountability by requiring the principal explicitly to authorize or ratify its agent's claims.<sup>140</sup> As applied

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135. *Id.* at para. 26.

136. Roberto Ago, while serving as a judge of the ICJ, described this mode of advisory opinion practice, where the constitutional instrument of the specialized agency involved renders the advisory opinion binding, as the functional equivalent of a request for a decision. See Roberto Ago, "Binding" *Advisory Opinions of the International Court of Justice*, 85 AM. J. INT'L L. 439 (1991).

137. *Cf. supra* text accompanying notes 72-76 (discussing the *Monetary Gold* principle). Technically speaking, the General Assembly could not be a "party" to an Article 59 contentious case, because the ICJ's Article 59 jurisdiction extends only to disputes between States, and therefore the *res judicata* and precedential concerns underlying *Monetary Gold* are technically inapplicable.

138. UN-WHO Agreement, *supra* note 129, art. X(2).

139. See *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). By parity of reasoning, judicial deference to the interpretation of an organ or specialized agency of the U.N. would signal respect for the underlying substantive lawmaking by the General Assembly that conferred law-making power to the delegate. *Cf. Henry Monaghan, Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 28 (1983) (otherwise legislative supremacy would be undercut).

140. See BICKEL, *supra* note 1, at 159-64. See also *Braden v. United States*, 365 U.S. 431, 432-33 (1961) (finding that Subcommittee's investigation of subjects authorized by Congress); *Wilkinson v. United States*, 365 U.S. 399, 409-13 (1961) (determining that Subcommittee of the House of Representatives Committee on Un-American Activities was pursuing valid legislative purpose); *Hannah v. Larche*, 363 U.S. 420, 430-39 (1960) (finding

in this case, the General Assembly's delegation of its authority to request an advisory opinion from the Court was interpreted so that it would not intrude upon the General Assembly's own request for an answer to a related, though quite different, question.<sup>141</sup> The Court's abstention thus served to assure that when a political organ spoke, its voice, rather than that of its delegee, was heard.<sup>142</sup>

*C. Non-Liquet and the Request of the General Assembly for  
an Advisory Opinion—The Political Question Doctrine  
as the Absence of Manageable Judicial Standards*

In performing its "grand" function in the second *Nuclear Test Case* regarding peacetime testing of nuclear weapons and abstaining entirely in the Request of the WHO regarding use of nuclear weapons in armed conflict, the Court may well have deemed it unnecessary to do more, since France had in any event undertaken to agree shortly to a comprehensive obligation not to test,<sup>143</sup> and the General Assembly itself had requested an advisory opinion on the subject.<sup>144</sup> Because the ICJ held that the General Assembly's request raised "legal questions," and the General Assembly's competence arguably extended to nuclear weapons,<sup>145</sup> the ICJ

that Commission on Civil Rights was authorized to adopt challenged rules of procedures); *Barenblatt v. United States*, 360 U.S. 109, 116–23 (1959) (upholding conviction of petitioner, who refused to answer questions before a Subcommittee of the House of Representatives Committee on Un-American Activities after summoned to testify; Committee's authority not unconstitutionally vague); *Kilbourne v. Thompson*, 103 U.S. 168 (1880) (holding that Congress may not conduct an investigation unrelated to legislative purposes).

141. See Request of WHO, *supra* note 41, at 33 (dissenting opinion of Judge Koroma). Judge Koroma stated that:

[T]he Court nonetheless interpreted those questions in such a way as to have ascribed almost identical meanings to them. It was this interpretation which emasculated the meaning of the WHO's question as if it had asked about the legality of the use of nuclear weapons *per se*, as in the case of the question by the General Assembly, and led the Court to conclude that the request for an advisory opinion by the WHO does not relate to a question arising within the scope of its activities.

*Id.* (discussing the role of the Court in exercising its advisory function).

142. Cf. Rostow, *supra* note 125, at 162 ("The General Assembly and the Security Council are institutions of general jurisdiction; duplicates create confusion and competition.").

143. See Nuclear Tests, *supra* note 117; see also William Drozdiak, *Chirac Ends France's Nuclear Test Program: Paris to Take "Active" Role in Disarmament*, WASHINGTON POST, Jan. 30, 1996, at A10; William Drozdiak, *France's Nuclear Storm: Plan To Test Resuming in Pacific Unleashes Typhoon of Anger*, WASHINGTON POST, July 8, 1995, at A5 (describing how public outcries against French nuclear testing were muffled by France's announcement that it would sign the Comprehensive Test Ban Treaty).

144. See G.A. Res. 49/75, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/75 (1994).

145. See *infra* text accompanying notes 174–80 (discussing competence of General Assembly and Security Council over nuclear weapons); see also, e.g., U.N. CHARTER art. 11, para. 1 ("The General Assembly may consider the general principles of co-operation in the



could not avoid deciding, as it had in the WHO Request for an advisory opinion, on the ground that the legal question was outside the General Assembly's competence.<sup>146</sup> Under the Court's own jurisprudence, only "compelling reasons" would permit it to exercise the discretion the Statute gives it to decline to render an advisory opinion.<sup>147</sup> Finding no compelling reasons, therefore, the ICJ spoke. Yet, what it did not say was even more important than what it did say. The Court refused to determine whether the right of self-defense trumped rules against the indiscriminate use of force as applied to nuclear weapons. Despite appearances, in this case too the ICJ's rhetoric exemplified the passive virtues.

### 1. *Non-Liquet*

On the surface, the advisory opinion reads as a delicate compromise predicated on the appearance of the ICJ's having no other alternative. Paragraph 2.E of the dispositif rendered the ICJ's central conclusion that "the threat or use of nuclear weapons would generally be contrary to the rules of international law," but that, "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."<sup>148</sup> The ICJ's formulation arguably amounted to a holding of non-liquet, in which a judge declines to pronounce judgment because of an alleged gap or insufficiency in the law.<sup>149</sup>

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maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.").

146. The ICJ said "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." Request of the General Assembly, *supra* note 39, at 819.

147. *See id.* at 818.

148. *Id.* at 831.

149. *See generally* SHAHABUDDIN, *supra* note 63, at 87-96 (treating the problem within the general framework of a modest interstitial law-making power for the ICJ, which, though precedent for the Court as master of its own competence, may or may not be accepted by the international community); Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983) (treating law as a binary system, in which there are no gaps because either the plaintiff wins or the defendant wins); Reisman, *supra* note 56 (arguing that, not theoretical gaps in the law, but institutional and pragmatic considerations explain and justify the decisions that in effect are non-liquets even if the Court does not describe them as such); Julius Stone, *Non-Liquet and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L L. 124 (1959) (critiquing Siorat and Lauterpacht, *infra*, and concluding that there is no rule prohibiting non-

Under one view of the non-*liquet* problem, the ICJ's abstention would not be an indirect exercise of the discretion the statute gives the ICJ to decline to answer a request for an advisory opinion, for Article 65 does not appear to allow the ICJ to refuse to answer, as it did here, merely a part of the question before it, but rather allows it to refuse, as it did not in this case, to respond to a request as a whole.<sup>150</sup> The ICJ's refusal to answer would therefore imply that the World Court was not empowered to say more until the authoritative law-making organs of the political community created new law to fill the gap. Abstention would be required by law.

It is not clear, however, that the ICJ's formulation was in fact a non-*liquet*, at least in the sense of a gap in the law leaving the ICJ no choice but to abstain. Judge Shahabuddeen, for example, argued that the ICJ's formulation should not be interpreted as a non-*liquet*. He maintained that any gap suggested by paragraph 2.E could be resolved through answering the underlying question whether nuclear weapons may be used in self-defense unless there is a prohibitory rule or whether nuclear weapons may not be used in the absence of a rule permitting their use.<sup>151</sup> Shahabuddeen framed this issue as a dispute over the interpretation of the *Lotus Case*, which has long been understood to permit States to do anything that is not prohibited by a rule of international law.<sup>152</sup> Under the received view of the *Lotus Case*, because there was no rule of prohibition, the use of nuclear weapons in accordance with the right of self-defense would be lawful. But Shahabuddeen suggested the *Lotus Case* might be limited to its facts, given changes in international society and law, so that use of nuclear weapons would be prohibited unless a State

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*liquet*); L. SORAT, *LE PROBLEME DES LACUNES EN DROIT INTERNATIONAL: CONTRIBUTION A L' ETUDE DES SOURCES DU DROIT ET DE LA FONCTION JUDICIAIRE* (1958) (arguing that State practice suggests that international law in some cases actually requires a non-*liquet*); H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 127-38 (1966); Hersch Lauterpacht, *Some Observations on the Prohibition of 'Non-Liquet' and the Completeness of the Legal Order*, in *SYMBOLAE VERZIJL* 196, 199 n.2 (Martinus Nijhoff ed., 1958) [hereinafter Lauterpacht, *Non-Liquet*] (arguing that a non-*liquet* in a contentious case is forbidden as a matter of law but recognizing that "the problem assumes a different complexion" in advisory opinions).

150. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65, para. 1. A non-*liquet* would also be problematic because it would run afoul of the *travaux préparatoires* of the Statute of the PCIJ, and accordingly the Statute of the ICJ whose relevant provisions are identical. See Gordon, *Legal Disputes*, *supra* note 25, at 193 (discussing objections of, among others, U.S. Secretary of State Elihu Root's to the possibility of non-*liquets* by the PCIJ).

151. See Request of the General Assembly, *supra* note 39, at 866 (dissenting opinion of Judge Shahabuddeen).

152. The Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7) (holding that, in the absence of a prohibitory rule of international law, Turkey could prosecute the captain of a French ship that had collided with, and harmed persons on, a Turkish ship on the high seas).

could establish the existence of a positive rule permitting their use. Under this reading of the *Lotus Case* and the controlling presumption in international law governing the application of the *jus in bello* to nuclear weapons, paragraph 2.E would be read to prohibit the use of nuclear weapons even in the most extreme case of self-defense.<sup>153</sup>

Others recognized the existence of ambiguity but felt unable to resolve it or dismissed its significance. Judge Bedjaoui, whose casting vote as President of the ICJ tipped the balance in favor of paragraph 2.E, refused to follow Shahabuddeen's path out of the apparant non-liquet. Bedjaoui conceded that international society, and thus its law, had changed since the *Lotus Case*, so that it was no longer possible to apply the received view of that case to resolve the gap with a presumption of legality in the absence of a prohibitory rule.<sup>154</sup> On the other hand, he was not prepared to agree with Shahabuddeen's argument that an anti-*Lotus* presumption controlled; rather, because of "the uncertainties surrounding the law and the facts," he concluded that, while the *Lotus Case* "gave the green light of authorization, having found in international law no reason for giving the red light of prohibition, the present Court does not feel able to give a signal either way."<sup>155</sup> Judge Vereschchetin also evaded taking a position, acknowledging that the ICJ's opinion "indirectly admits the existence of a 'grey area' in the present regulation" of nuclear weapons.<sup>156</sup> But he argued that regardless of whether the ICJ was permitted to declare a non-liquet in a contentious case, in an advisory opinion the ICJ is "requested not to resolve an actual dispute between actual Parties, but to state the law as it finds it at the present stage of its development."<sup>157</sup>

That the ICJ's non-decision was a non-liquet was a distinctly minority view. Judge Higgins deplored the dispositif, arguing:

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153. See Request of the General Assembly, *supra* note 39, at 902-03 (dissenting opinion of Judge Weeramantry) (arguing that although the *Lotus* presumption states that a State is free to act unless prohibited, its application is limited by the factual circumstances of the case which did not involve war).

154. *Id.* at I.L.M. 1345-47 (declaration of President Bedjaoui). Bedjaoui argues that the change in international society and law flowed not only from changes in positive law but also in a transformation of the underlying conception of international law from a system of positive rules into a normative order. As a result, the law is "the reflection of a collective juridical conscience and . . . a response to the social necessities of States organized as a community." *Id.* at 1346.

155. *Id.*

156. *Id.* at 833 (declaration of Judge Vereshchetin).

157. *Id.* Judge Vereshchetin cites the arguments of Stone and Siorat as support for the prohibition on a declaration of non-liquet. See Stone, *supra* note 149; Siorat, *supra* note 149.

That the formula chosen is a non-*liquet* cannot be doubted, because the Court does not restrict itself to the inadequacy of the facts and argument concerning the so-called "clean" and "precise" weapons. . . . The formula in the second part of paragraph 2.E refers also to the "current state of international law" as the basis for the Court's non-*liquet*.<sup>158</sup>

Yet, Judge Higgins's reasoning fails to grapple with the possibility that if the Court had had sufficient "element of fact at its disposal," it might have found "the current state of international law" adequate to meet the challenge. This is surprising because Judge Higgins herself recognized that it is "exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations."<sup>159</sup> Law is law, in other words, only in the sense that it gives a precise meaning to specific set of facts—in other words, a holding.<sup>160</sup> Thus, an "adequate" statement of facts might not have required the ICJ

158. Request of the General Assembly, *supra* note 39, at 937 (dissenting opinion of Judge Higgins). It should be noted that the United Kingdom, Judge Higgins's country of nationality, suggested in a written statement to the Court that in "the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which cause[s] comparatively few civilian casualties." *Id.* at 829.

159. *Id.* at 937.

160. See, e.g., Frankfurter, *supra* note 33. Some U.S. State courts exercising statutorily-created advisory opinion jurisdiction in response to certified questions from federal district courts sitting with diversity jurisdiction have expressed similar wariness regarding the adequacy of the factual basis for their rendering authoritative interpretations of state law. See *Western Helicopter Serv., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 630 (Or. 1991) (stating that certification "is not appropriate if disputed facts make questions of law unclear"); *In re Certified Question*, 549 P.2d 1310 (Wyo. 1976) (holding that the Wyoming Supreme Court will not answer a certified question unless nothing is left for the federal court to do but apply the answer to the question and enter judgment); *In re Richards*, 223 A.2d 248 (Me. 1966) (refusing to answer a certified question because of uncertainty as to all the material facts and the absence of specific finding of the federal district court that Maine law would be determinative); see generally 17A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4248 (2d ed. 1988).

Arguably, the U.S. State court reticence to render advisory opinions when the factual matrix is unsettled may simply flow from the predisposition of U.S. legal culture and the U.S. constitution to engage in constitutional review only in the *Marbury v. Madison* "case and controversy" mode. See generally Monaghan, *supra* note 139, at 11–14 (discussing theory of constitutional review as incidental only to adjudication of private rights). However, similar reticence can be found even in municipal legal systems, such as Canada's, that are quite familiar with advisory opinion, or "reference," procedure. See James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251, 1270–73 (1990) (discussing cases evidencing desire to avoid review in the abstract; citations omitted); see also *id.* at 1277 n.159 (noting that, under British law, the House of Lords was entitled to advisory opinions from the courts) (citations omitted). It may be, therefore, that Judge Higgins' preference for fact-intensive review even in the advisory opinion context reflects a cultural preference of lawyers educated in common law legal systems.

to "ramble through the wilds"<sup>161</sup> of international law, allowing it instead to narrow the question to one that could be answered given even the "current state of international law." Indeed, the most productive advisory opinions of the ICJ have drawn significant new general principles from fact intensive cases.<sup>162</sup>

Nonetheless, the ICJ stated it "[did] not consider that, in giving an advisory opinion in the present case, it would necessarily have to write 'scenarios,' to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information."<sup>163</sup> The concern seemed artificial especially in the case of the request of the General Assembly; in order to fill the gap ostensibly left by paragraph 2.E, it would not have been necessary for the ICJ to engage in hypothetical reasoning because the Court certainly had available to it "elements of fact" sufficient for it to decide in at least one case whether nuclear weapons could be used for self-defense in extremis. Judge Schwebel's dissenting opinion, for example, discusses the actual case of the Gulf War, in which a coalition of States, acting pursuant to Security Council Resolution 678's authorization for the use of "all necessary means," forcibly ejected Iraqi forces from Kuwait, and thus ensured Kuwait's survival as a State.<sup>164</sup> Judge Schwebel observed that, although President Bush had privately ruled out the option of using nuclear weapons in the conflict, U.S. Secretary of State Baker implied, and Iraqi Foreign Minister Tariq Aziz indeed inferred, a U.S. threat to use nuclear weapons that deterred Iraq's first use of weapons of mass destruction.<sup>165</sup>

161. *United States v. Topco*, 405 U.S. 596, 610 n.10 (1972) (Justice Marshall's *bon mot* on the perils of economic theory in antitrust analysis).

162. *See generally* *Western Sahara (Morocco v. Spain)*, 1975 I.C.J. 12 (Oct. 16) (stimulating transformations in the law of self-determination that have continued, with developments in the former Soviet Union, former Yugoslavia and perhaps now even with East Timor); *Legal Consequences for States*, *supra* note 64 (reshaping, among other things, international human rights law, in the course of addressing specific factual claims regarding the Mandate to South Africa and its performance of its legal obligations in Namibia); *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20) (affirming, in light of the refusal of certain states to pay for the U.N. operation in the Congo, the U.N.'s power to establish and fund, peacekeeping operations, which until Resolution 678 and its successors, was the principal vehicle for the Council's discharge of its responsibilities to maintain international peace and security); *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (making clear the legal personality of the U.N. and its organs in the context of a specific U.N. claim for relief arising out of an attack against a U.N. officer, Count Bernadotte).

163. *Request of the General Assembly*, *supra* note 39, at 819.

164. *Id.* at 840-41 (dissenting opinion of Vice-President Schwebel); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. para. 2, U.N. Doc. S/RES/678 (1990).

165. *See Request of the General Assembly*, *supra* note 39, at 840-41 (dissenting opinion of Vice-President Schwebel). Vice-President Schwebel concluded:

Thus there is on record remarkable evidence indicating that an aggressor was or may have been deterred from using outlawed weapons of mass destruction against

Furthermore, Judge Schwebel's comment that "the principles of the United Nations Charter were sustained rather than transgressed by the threat" suggests that he understood the legality of the threat to rest on the authorization granted by the Security Council.<sup>166</sup>

There were sound prudential reasons, however, for the ICJ not to embark on this voyage of judicial discovery. If the Court had followed Judge Schwebel's suggestion, it might well have had to pronounce on the conduct of the United States, turning the case in effect into a contentious proceeding and thereby implicating consideration underlying the Court's abstention in *Monetary Gold*.<sup>167</sup> In addition, the ICJ could not have been indifferent to the turmoil caused by its last attempt in the *Nicaragua Case* to pronounce upon the use of force by the United States.<sup>168</sup>

More important, the legal and factual issues in such an analysis would have been exceedingly complex. Judge Schwebel did not, for example, make the case that the Security Council specifically intended its "all necessary means" formulation to authorize Coalition forces to use or threaten to use nuclear weapons if it were determined that such threat or use would be "necessary" to liberate Kuwait and prevent its dissolution as a State. He did, however, suggest what might have been an alternative line of defense for the United States, noting that Security Council's

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forces and countries arrayed against its aggression at the call of the United Nations by what the aggressor perceived to be a threat to use nuclear weapons against it should it first use weapons of mass destruction against the forces of the coalition.

*Id.* at 842.

166. Judge Schwebel asked: "Can it seriously be maintained that Mr. Baker's calculated—and apparently successful—threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat." *Id.* The reference to the "principles" of the Charter should be read as an implicit admission that, in theory at least, the Charter's principles and purposes, subject to the exception in Article 2(7)'s domestic jurisdiction principle with respect to enforcement action, continue to operate to limit the Security Council's power to make binding decisions. It may be significant in this context that Judge Schwebel did not refer to customary international law as a limit that the Security Council's powers may not transgress. The Court, by contrast, had observed that "fundamental rules [of humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." *Id.* at 827.

167. See *supra* text accompanying notes 72–76. Article 68 of the Statute also provides: "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 68.

168. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27) (deciding without the benefit of facts the U.S. might have presented concerning Nicaraguan activities, because the U.S. withdrew from the compulsory jurisdiction of the Court and refused to participate in the proceedings, that U.S. conduct violated international law); see generally THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS, *supra* note 25 (varying opinions on the continued utility of the Court and the U.S. decision to withdraw its acceptance of the ICJ's compulsory jurisdiction under Article 36(2) of the Statute).

adoption of Resolution 984 of April 11, 1995,<sup>169</sup> which welcomed the so-called positive security assurances of nuclear weapon States, implied that the Council "accepted the possibility of the threat or use of nuclear weapons, particularly to assist a non-nuclear weapon State that . . . 'is a victim of an act of an act of, or an object of a threat of, aggression in which nuclear weapons are used.'"<sup>170</sup> Obviously, Schwebel was aware that Resolution 678 and the alleged U.S. threat to use nuclear weapons preceded the adoption of Security Resolution 984 (1995). But as to the Security Council commitment with respect to the positive security assurances of the nuclear-weapon States, Resolution 984 at a minimum restates Security Council Resolution 255 (1968),<sup>171</sup> which predated the Gulf War. Accordingly, Schwebel's reference to Resolution 984 suggests he believes Resolution 255 could be read *in pari materia* with Resolution 678 to authorized the threat or use of nuclear weapons to reverse Iraqi aggression. Based on the legislative history of Resolution 984, the argument would seem to be even stronger in the case involving a Security Council resolution adopted after Resolution 984 which authorizes the use of "all necessary means" to address a Chapter VII situation.<sup>172</sup> But even if the legal theory were sustainable, Schwebel would still need to fully make out the critical factual predicate of whether at the time of the Gulf War the United States had sufficient reason to believe that Iraq had acquired a nuclear weapons capability to warrant a threat to deter an Iraqi first use.<sup>173</sup>

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169. See S.C. Res. 984, U.N. SCOR, 50th Sess., U.N. Doc. S/RES/984 (1995).

170. Request of the General Assembly, *supra* note 39, at 838 (dissenting opinion of Vice-President Schwebel).

171. Compare S.C. Res. 984, *supra* note 169, with S.C. Res. 255, U.N. SCOR, 23d Sess., U.N. Doc. S/RES/255 (1968).

172. Statements by at least some States, which criticized the Council's refusal to declare in advance that a "threat or use of nuclear weapons" was a "threat to the peace, breach of the peace or act of aggression" for purposes of authorizing the use of "all necessary means" by Member States, could be construed to suggest that a retaliatory threat would be encompassed by an "all necessary means" resolution. Iran, which as a victim of Iraq's use of weapons of mass destruction had an interest in the Council's threatening to use nuclear weapons to deter Iraq from such use, stated that "the Security Council should be prepared to use all necessary means in defense of the victims [of aggression involving the use or threat of use of nuclear weapons] in accordance with the United Nations Charter." U.N. SCOR, 50th Sess., 3514th mtg. at 7, U.N. Doc. S/PV.3514 (1995) (Statement of Iranian Representative, Ambassador Kharrazi). Egypt, probably feeling equally threatened, argued that, where a "non-nuclear-weapon State was the object of a nuclear attack or threat of an attack, [i]t is axiomatic that the magnitude in the degree of devastation and destruction by nuclear weapons necessitates a proportionate elevation of the Security Council's response." *Id.* at 11 (statement of Egyptian Representative, Ambassador Elaraby).

173. See Jessica Mathews, *Iraq's Nuclear Warning*, WASHINGTON POST, July 16, 1991, at A19 (discussing Iraq's acknowledgment of a nuclear weapons program); William Drozdiak, *U.S., France Back Force if Needed: Bush, Mitterrand Agree on Steps Against Iraq*, WASHINGTON POST, July 15, 1991, at A1 (reporting President Bush as stating that there was uncontro-

## 2. Separation of Powers and Federalism

In any event, a close reading of the ICJ's opinion suggests that the Court may have refused to address this concrete case and the issues it spawned, not because of the complexity of the relevant Security Council resolutions and the concrete facts in which they were applied, but for what might loosely be called international separation of powers and federalism reasons. As to separation of powers, the Court was faced with an apparent conflict between the Security Council and the General Assembly. On one hand, while recognizing that "the Security Council may take enforcement measures under Chapter VII of the Charter, the Court did "not consider it necessary to address questions which might, in a given case, arise from application of Chapter VII."<sup>174</sup> On the other hand, while implicitly acknowledging law-making power in the General Assembly,<sup>175</sup> the ICJ determined that the relevant General Assembly resolutions on the legality of the threat or use of nuclear weapons failed to establish the existence of a prohibitory rule.<sup>176</sup> Refusing to accord priority to the Assembly or the Council, the ICJ was noticeably silent about Article 12 of the Charter, which provides that:

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.<sup>177</sup>

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verted evidence that Hussein was lying about Iraq's nuclear capability); Patrick E. Tyler, *Iraq Nuclear Program Stirs Debate: Analysts Differ on Baghdad's Capability to Build Bomb*, WASHINGTON POST, June 4, 1989, at A35 (reporting different assessments concerning Iraq's nuclear capabilities and potentials before the Gulf War).

174. Request of the General Assembly, *supra* note 39, at 823. Admittedly, the Court also said that "[a] weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter." *Id.* at 822. However, the Court did not find that nuclear weapons were unlawful per se, but rather only "generally" so. *See id.* at 831.

175. After discussing the disarmament-related activities of the General Assembly, the Court said that:

[T]he Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly's activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it is seised.

*Id.* at 817. Because the "above-mentioned field" was disarmament, the Court's suggestion that its activities had "led it only to . . . making recommendations" leaves open the possibility that, if its activities had led it to making binding decisions, the General Assembly would have been competent to do so.

176. *See id.* at 826.

177. U.N. CHARTER art. 12, para 1.



This may be because whether the General Assembly's duty to refrain from making recommendations is controlling, when the Security Council through inaction is not "exercising . . . the functions assigned to it"<sup>178</sup> for "the maintenance of international peace and security,"<sup>179</sup> has never been authoritatively determined.<sup>180</sup> In short, the Court suggested that, even though both organs were free to legislate, neither had done so. Rather than address the separation of powers conflict, the Court chose to dissolve it.

Similarly, the ICJ refrained from resolving the international federalism issues posed by the conflict between, on one hand, the international community's right not to permit the use of weapons that violate the humanitarian law principles of discrimination and proportionality, and on the other, a sovereign State's right to individual and collective self-defense.<sup>181</sup> While the Court did not itself refer to the *Lotus* problem, Judge Fleischhauer's separate opinion explained why it should not now be answered by legal analysis, given "the legal and moral difficulties of the territory into which the Court has been led by the question asked of it by the General Assembly" and the fact that international politics, in his view, "have not yet produced a system of collective security of such perfection that it could take care of the dilemma, swiftly and efficiently."<sup>182</sup> Judge Fleischhauer therefore concluded that "there is no rule of international law according to which one of the conflicting principles would prevail over the other."<sup>183</sup> Indeed, he argued that recourse to municipal law principles to redress the ambiguity of treaty and customary

178. *Id.*

179. *Id.* at art. 24, para 1.

180. *See, e.g.*, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Pt. 7, Supp. No. 20, at 10, U.N. Doc. A/1775 (1950) (adopted by the U.N. General Assembly on Nov. 3, 1950 in response to the impasse at the Security Council over the Korean war). Paragraph A(1) of the Resolution states that:

[i]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

*Id.*

181. *See* Jeremy Stone, *Less Than Meets the Eye*, BULL. ATOMIC SCIENTIST, Sept./Oct. 1996, at 43, 44 (noting that the Court's formulation in paragraph 2.E refers to "a" State's survival, permitting the State using or threatening the use of nuclear weapons to ensure the survival of another State).

182. Request of the General Assembly, *supra* note 39, at 835 (separate opinion of Judge Fleischhauer).

183. *Id.*

law would pose the same tension, for "no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects."<sup>184</sup> The President of the Court, Judge Bedjaoui, emphasized the other side of the problem, observing "[i]t would be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself."<sup>185</sup> Thus, the debate between Judges Fleischhauer and Bedjaoui identifies the central dilemma of the international community: namely, whether a State's right to exist should trump that State's duty to die for the sake of the international community.

### 3. Moral Questions and Political Answers

The presumption in the *Lotus Case* confirms the enduring significance of State sovereignty, for States through their will constitute the international community; yet, the possible contrary of the *Lotus Case* is that States are constituted by the international community.<sup>186</sup> Could a State, so long as it remained a State, ever give up its right to exist? Under the contrary of the *Lotus Case*, could a State ever insist on its right to survive at the price of destroying another State when its very existence is by leave of the international community? *Lotus* and anti-*Lotus* make a more engaging debate, however, if we substitute the word "people" for "State." This is at core a question of constitutional dimension, implicating the U.N. Charter's simultaneous commitments to, on one hand, "equality of rights and self-determination of peoples" and, on the other, to "universal peace."<sup>187</sup> In other words, can there be an international "constitution" that retains "federal" qualities without preserving an irreducible minimum of State autonomy?<sup>188</sup> Not surprisingly, Bickel located the origins of his enterprise in the so-called "Lincolntian tension"

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184. *Id.*

185. *Id.* at 1347 (declaration of President Bedjaoui).

186. The distinction arises in other contexts as well, for example in the debate between the declaratory and constitutive theories of recognition. See H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 38-41 (1947). In that context as well, a move toward regarding States as creatures of the international community rather than the international community as the creature of States is manifest. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 7 (1987); Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

187. U.N. CHARTER art. 1, para. 2 (including among the purposes of the United Nations "friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

188. U.S. CONST. art. V (providing that the Senate cannot be abolished by an amendment to the Constitution; thus, implicitly, entrenching state sovereignty as an irrevocable component of American constitutionalism).

between high principle and government by consent, which Abraham Lincoln endured in leading the United States to its confrontation with the question of how to reconcile its survival as a “federal” republic with the continuation of an unjust order.<sup>189</sup>

For the international order, the threat or use of nuclear weapons is also inescapably a question of the enormous moral significance that Judge Fleischhauer saw in the General Assembly’s request. The problem recalls *Regina v. Dudley and Stevens*, a 100 year-old English case, in which the Court was asked to decide whether two seaman who murdered a cabin boy and then ate him, when there was “no sail in sight, nor reasonable prospect for relief,” were criminally liable.<sup>190</sup> The problem sounds also in the classic hypothetical based on this case constructed by Lon Fuller, concerning Speluncean explorers caught in a cave who agreed to choose one of their number by lot to give up his own life so that his remains would provide sustenance for the survivors until they could be rescued.<sup>191</sup> This hypothetical served as the material for imagined judicial and academic opinions concerning whether to convict for murder, and if so, whether to grant executive clemency to the men who killed one of their number. The victim had been selected for death through the method the parties had chosen—even though he had attempted to withdraw from the agreement before the roll of the dice.<sup>192</sup> Yet, Fuller also supposed the men trapped in the cave had access to communications with the outside world, and that they sought the counsel of officials of the State, physicians and members of the clergy, but that no one was prepared to give them more than technical advice concerning the likely time they would be reached by rescuers and the probability of survival of given numbers of men depending on the available nourishment.<sup>193</sup> Perhaps the ICJ was equally sensible in refusing to give an answer to so fundamental a question.<sup>194</sup>

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189. See BICKEL, *supra* note 1, at 68.

190. PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 533, 534 (1982) (quoting *Queen v. Dudley and Stephens*, 14 Q.B. 273, 275 (1884)).

191. See Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); reprinted in *ANALYTIC JURISPRUDENCE ANTHOLOGY* 1 (Anthony D’Amato ed., 1996).

192. See *id.* at 2–3.

193. See *id.* at 2.

194. In a sense, the Court’s reaching out to interpret the NPT to require the abolition of nuclear weapons, when that was not the question the Assembly asked, is also a clue to the essentially moral nature of the Court’s deliberations. Generally, the ICJ’s conclusions—that deterrence is conditionally permitted, that nuclear weapons’ use would ordinarily violate rules of discrimination and proportionality that constrain the use of force, but that the use of nuclear weapons in an extreme case of self-defense cannot be ruled out—track the conclusions of moral philosophers of the Catholic tradition, the Bishops of the American and French Catholic Churches, who addressed these questions nearly fifteen years ago. See PASTORAL LETTER OF

If, then, the ICJ's non-*liquet* was an exercise of its discretion not to decide, it may explain Judge Vereshchetin statement—relying on Judge Hersh Lauterpacht's receptivity, rather than Professor Lauterpacht's resistance, to non-*liquet*<sup>195</sup>—that “the case at hand presents a good example of an instance when the absolute clarity of the opinion would be deceptive and where on the other hand, its partial apparent indecision may prove useful as a guide to action.”<sup>196</sup> This would be consistent with the ICJ's refusal to consider the relevance of *jus cogens*,<sup>197</sup> which would have had the effect of closing the doors to the political evolution of the issue.

The apparent non-*liquet* in paragraph 2.E of the *dispositif* thus serves purposes not dissimilar to those Bickel attributed to abstention on the ground of vagueness; thus, a finding that it is impossible to say what the law is on a given point is a restraint on delegation of the “power to make decisions that do not derive from a prior legislative decision and that do not, therefore, represent the sovereign will . . . as it should be.”<sup>198</sup> The apparent non-*liquet* invites the political organs to discharge their own “duty to decide” the fundamental questions that would need to be answered to determine the legality of the use of nuclear weapons in a case of self-defense.

The same might be said about the Court's gratuitous though unanimous conclusion, in paragraph 2.F of its *dispositif*, that the obligation States have undertaken under Article VI of the NPT to “pursue in good faith” negotiations leading to nuclear disarmament also includes an

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THE UNITED STATES CATHOLIC BISHOPS: 1975-1983, at 530-46 (Hugh Nolan ed., 1983) (discussing reasons why reliance on nuclear weapons for deterrence is not absolutely condemned); GAGNER LA PAIX, [French Catholic Bishops]. *But see* JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 123-24 (1987) (rejecting the Bishops' prudential judgments that deterrence is merely a bluff or that discriminate use or threat of use of nuclear weapons in the current deterrence system is possible).

195. See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958). Lauterpacht's comment, published while he sat on the bench, approving an “apparent indecision [of the ICJ], which leaves room for discretion on the part of the organ which requested the opinion,” *id.* at 152, might be contrasted with his earlier academic writing in which he seems to have thought that the rule against non-*liquets* should be applied as well to advisory opinions. See Lauterpacht, *Non-Liquet*, *supra* note 149, at 199; compare Stone, *supra* note 149, at 128-29 n.7 (observing that Lauterpacht's analysis seems predicated on the assumption, which Stone rejects, that advisory opinions are adversary in nature and therefore do not differ radically from contentious cases) with Request of the General Assembly, *supra* note 39, at 937 (dissenting opinion of Judge Higgins) (describing “the role of the International Court, whether in contentious proceedings or in its advisory functions,” to apply the law to specific situations).

196. Request of the General Assembly, *supra* note 39, at 833 (declaration of Judge Vereshchetin) (quoting Lauterpacht, *supra* note 195, at 152).

197. See Request of General Assembly, *supra* note 39, at 828.

198. BICKEL, *supra* note 1, at 151-52.

obligation "to bring to a conclusion" those negotiations.<sup>199</sup> This remarkable statement, described as dictum by Judge Schwebel,<sup>200</sup> not only reads words into the NPT that do not exist but seems to suppose that that States believed it certain that they could achieve complete nuclear and general disarmament. The ICJ's statement is plainly at odds with the "good faith efforts" formulation the NPT parties chose, and the Court failed to support its interpretation with references to the NPT's preparatory work or the subsequent practice of the parties.<sup>201</sup> Paragraph 2.F thus recalls the ICJ's *obiter dictum* in the second *New Zealand v. France Nuclear Test Case* concerning the relevance of international environment law to underground nuclear testing.<sup>202</sup> Yet, unlike that latter case, the ICJ may have moved so far from the text of article VI of the NPT that its heightened exposure to criticism for judicial lawmaking may well undercut the persuasiveness of the principles it articulated.<sup>203</sup> On the other hand, the World Court failed to hold that the obligation it read into Article VI has as yet been breached, notwithstanding the failure of the nuclear weapon States to bring into force START II and to negotiate further reductions.<sup>204</sup>

In any event, paragraphs 2.E and 2.F of the *dispositif* taken together suggest that, not only in avoiding questions it could answer but also in answering questions it was not asked, the Court seems to have been

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199. Request of the General Assembly, *supra* note 39, at 831.

200. *See id.* at 842 (dissenting opinion of Vice-President Schwebel).

201. *But see id.* at 830-31 (citing a variety of arguably related prior and subsequent international instruments; however, none treats the achievement of nuclear disarmament as more than a "need" or "goal" of the international community).

202. *See* *Underground Nuclear Test*, *supra* note 117.

203. Abram Chayes has argued that "the authority of World Court decisions depend ultimately upon their persuasive force." Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1041 n.77 (1988) (citing Chayes, *Nicaragua, the United States and the World Court*, 85 COLUM. L. REV. 1445, 1481 (1985) (relying on BICKEL, *supra* note 1)).

204. *See* John F. Harris & Michael Dobbs, *Clinton, Yeltsin to Meet in Helsinki: March Summit Designed to Allay Russia's Fears Over NATO Expansion*, WASHINGTON POST, Feb. 8, 1997, at A17 (stating that the Russian legislature stalled ratification of START II treaty for the past four years); Jessica Mathews, *Putting Plutonium in Prison*, WASHINGTON POST, Feb. 4, 1997, at A15 (stating reasons why Russia is showing no interest in ratifying START II treaty); R. Jeffrey Smith, *U.S. Studies Deeper Nuclear Warhead Cuts: Possible START III Pact Could Encourage Russia to Ratify 1993 Arms Reduction Treaty*, WASHINGTON POST, Jan. 23, 1997, at A4 (U.S. proposals for new cuts to persuade Russian legislature to ratify START II treaty); *cf.* *Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document (Part I)*, U.N. NP7/Conf. 1995/32 (Part I) (May 11, 1995), reprinted in 34 I.L.M. 959, 969-70 (1995) (committing the nuclear powers to enhanced disarmament efforts); George Bunn, *Expanding Nuclear Options: Is the U.S. Negating Its Non-Use Pledges?*, ARMS CONTROL TODAY, May/June 1996, at 7 (arguing that U.S. pledges in connection with the extension of the NPT, under international law, constitute legally binding, rather than merely political, commitments of the U.S.).

cognizant of its "grand" function of articulating principles that could further prudential judgments by the political community. Indeed, if recent evidence of efforts by former members of the nuclear weapons establishments of the nuclear powers to encourage nuclear disarmament are to be taken at face value,<sup>205</sup> then the ICJ advisory opinion may well have given new meaning to the expression "thinking the unthinkable."

### CONCLUSIONS

Whether the ICJ's use of its "arsenal of devices" succeeds or fails, in any particular case, to stimulate a process of democratic international decisionmaking that achieves concrete results does not invalidate its efforts. Yet, with time, Namibia became independent. With time, the people of East Timor will find a way to exercise their right of self-determination. And, with time, even the present system of deterrence will give way. Even so, what matters instead is that the ICJ's participation in the governance of the international community encourages political participation in reasoned debate structured by principle. The ICJ's own institutional survival may well depend on its occasional willingness to exercise restraint. The judges of the ICJ are not elected directly by the people of the world, though they can claim a modicum of democratic legitimacy in their indirect election by the peoples of the world through their election by the votes of the Security Council and General Assembly,<sup>206</sup> many of whose members are now represented by democratically elected governments. But institutional self-preservation is not the central reason for abstention by the ICJ. Rather, for the Court to heed the call of the passive virtues would serve far larger aims wherever restraint might reasonably stimulate principled debate, thus improving the prospects for confronting the important issues that face the world community at the dawn of the next millennium. The world is now small enough that meaningful transnational debate is possible. The ICJ's reliance on "the

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205. See Mike Moore, *A Boost for Abolition*, BULL. ATOMIC SCIENTIST, Nov./Dec. 1996, at 38 (discussing the report of the Canberra Commission, a group of former government officials and nuclear weapons experts calling for a specific set of steps toward nuclear disarmament in the near future); see also *Statement on the Reduction of Nuclear Arsenals by Gens. Butler and Goodpaster and Statement on Nuclear Weapons by International Generals and Admirals*, ARMS CONTROL TODAY, Nov./Dec. 1996, at 15, 18; Steve Coll & David B. Ottaway, *Will the United States, Russia and China be Nuclear Partners or Rivals in the 21st Century?*, WASHINGTON POST, Apr. 11, 1995, at A1 (reporting views of former head of U.S. Strategic Air Command, General Lee Butler, favoring disarmament). But see Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 434 (1997) (Principal Deputy Legal Advisor of the Department of State arguing that the ICJ opinions do not call for any change in current U.S. policies).

206. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 4, para. 1.

passive virtues” is no vice, so long as the Court remains within its pro-dialogic role of furthering the global forum.